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FILED
NOV 16 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-9361

In The

Supreme Court of the United States

October Term, 1998

LOUIS JONES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed June 2, 1998
Certiorari Granted October 5, 1998

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1/5/98[2]	JUDGMENT OF USCA (certified copy) as to Louis Jones Re: [180-1] appeal, [170-1] appeal

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[1] Although this entry is taken verbatim from the docket sheet of the District Court, the date has been changed to reflect the actual date of the filing of the Fifth Circuit's opinion.

[2] Although this entry is taken verbatim from the docket sheet of the District Court, the date has been changed to reflect the actual date of the filing of the Fifth Circuit's judgment.

affirming judgment/order; it is now here ordered and adjudged by this Court that the sentence and conviction of the District Court in this cause are affirmed

3/4/98[3] Rehearing denied by USCA5

[3] This docket entry does not appear in the docket sheet of the District Court but is nonetheless included for completeness of the procedural history in this case.

SEALED

UNSEALED AS PER
NOTIFICATION FROM
U. S. ATTY'S
OFFICE 3/8/95 11:30 a.m. /s/ AL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

UNITED STATES OF AMERICA	§	CRIMINAL NO.
v.	§	6-95 C4 0015-C
	§	(Filed
LOUIS JONES	§	Mar. 7, 1995)
THE GRAND JURY CHARGES:	§	
	§	

COUNT 1

On or about February 18, 1995, in the San Angelo Division of the Northern District of Texas, the elsewhere, **LOUIS JONES**, defendant, did wilfully and unlawfully seize, confine, inveigle, kidnap, abduct, and carry away and hold for ransom, reward, and otherwise, Tracie Joy McBride, and did wilfully transport said Tracie Joy McBride from Goodfellow Air Force Base, San Angelo, Texas, said Air Force Base being within the special maritime and territorial jurisdiction of the United States; and as a result the death of Tracie Joy McBride occurred.

In violation of Title 18, United States Code, Sections 7(3) and 1201(a)(2).

COUNT 2

On or about February 18, 1995, in the San Angelo Division of the Northern District [sic] Texas, **LOUIS JONES,** defendant, at a place within the special maritime and territorial jurisdiction of the United States, namely Goodfellow Air Force Base, on land acquired for the use of the United States and under its exclusive jurisdiction, did assault Michael Alan Peacock, resulting in serious bodily injury.

In violation of Title 18, United States Code, Sections 7(3) and 113(f).

A TRUE BILL;

/s/ Illegible
FOREPERSON

PAUL E. COGGINS
UNITED STATES ATTORNEY

/s/ Tanya K. Northrup
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	§	
	§	Criminal No. 5:95-CR-047-C
v.	§	
	§	
LOUIS JONES	§	

NOTICE OF INTENT TO SEEK THE DEATH PENALTY

(Filed Sept. 13, 1995)

COMES NOW, the United States of America, by and through the United States Attorney for the Northern District of Texas, and files, pursuant to Title 18, United States Code, Sections 3591 through 3593, this notice of its intent to seek the death penalty against the defendant, **LOUIS JONES,** in the event **JONES** is convicted of Count One of the Indictment, which charges kidnapping resulting in death, in violation of Title 18, United States Code, Section 1201(a), and would show the Court and the jury as follows:

I.

The United States of America believes that the circumstances of the instant offense of kidnapping resulting in death are such that, if the defendant, **LOUIS JONES,** is convicted, a sentence of death is justified under Chapter 228 of Title 18, United States Code, Sections 3591(a), 3592(a), and 3592(c).

II.

The United States of America will prove, at a hearing to be held pursuant to Title 18, United States Code, Section 3593, that:

a. the defendant, **LOUIS JONES,** on or about February 19, 1995, did intentionally kill Tracie Joy McBride by hitting her in the head with a tire iron;

b. the defendant, **LOUIS JONES,** on or about February 19, 1995, did intentionally inflict serious bodily injury, that resulted in the death of the victim, Tracie Joy McBride, by hitting her in the head with a tire iron;

c. the defendant, **LOUIS JONES,** on or about February 19, 1995, did intentionally participate in an act, namely hitting Tracie Joy McBride in the head with a tire iron, contemplating that the life of Tracie Joy McBride would be taken and intending that lethal force would be used in connection with Tracie Joy McBride, and the victim, Tracie Joy McBride, a person other than one of the participants in the offense, died as a direct result of the act;

d. the defendant, **LOUIS JONES,** on or about February 19, 1995, did intentionally and specifically engage in an act of violence, namely hitting Tracie Joy McBride in the head with a tire iron, knowing that the act created a grave risk of death to a person other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim, Tracie Joy McBride, died as a direct result of the act.

III.

The United States of America will prove the following statutory aggravating factors to justify a sentence of death:

a. the defendant, **LOUIS JONES,** caused the death and the injury resulting in the death of Tracie Joy McBride, during the commission of the offense of kidnapping (Title 18, United States Code, Section 3592(c)(1));

b. the defendant, **LOUIS JONES,** in the commission of this offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense, Tracie Joy McBride (Title 18, United States Code, Section 3592(c)(5));

c. the defendant, **LOUIS JONES,** committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture and serious physical abuse to the victim, Tracie Joy McBride (Title 18, United States Code, Section 3592(c)(6)); and

d. the defendant, **LOUIS JONES,** committed the offense after substantial planning and premeditation to cause the death of Tracie Joy McBride (Title 18, United States Code, Section 3592(c)(9));

IV.

The United States of America will prove the following nonstatutory aggravating factors to justify a sentence of death:

a. future dangerousness to the lives and safety of other persons, as evidenced by specific threats and acts of violence, including, but not limited to the following:

1. In or about 1968, the defendant, **LOUIS JONES,** was convicted of the offense of Battery in the State of Illinois;

2. In or about 1970, the defendant, **LOUIS JONES,** in the Chicago, Illinois area, assaulted Daniel Lacko;

3. In or about February, 1994, the defendant, **LOUIS JONES,** in the San Angelo, Texas area did assault Sandra Lane (both physically and sexually) and Jessica Lane;

4. In or about March, 1994, the defendant, **LOUIS JONES,** in the San Angelo, Texas area did become involved in a confrontation with Sandra Lane on Goodfellow Air Force Base;

5. On or about February 16, 1995, the defendant, **LOUIS JONES,** in San Angelo, Texas did abduct Sandra Lane from her home at gunpoint. During the course of this abduction and prior to her release, **LOUIS JONES** among other acts, robbed and sexually assaulted Sandra Lane;

6. During the years 1988 through 1995, inclusive, the defendant, **LOUIS JONES,** engaged in assaultive behavior directed towards Sandra Lane;

See Jurek v. Texas, 428 U.S. 262, 272-273, 96 S.Ct. 2950, 2956-2957 (1976) ("probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").

b. Tracie Joy McBride was 19 years old at the time of her death. She was small in stature weighing only 99 pounds and measuring 61 inches at the time of her autopsy on March 3, 1995. This is in contrast to the defendant, **LOUIS JONES,** who served over twenty years in the Army and was a member of the Army Airborne Rangers. **JONES** was highly trained in many areas including hand-to-hand combat.

Tracie Joy McBride was new to Texas and was unfamiliar with the area. She had been stationed in San Angelo, Texas at Goodfellow Air Force Base approximately 10 days prior to her abduction and had only been off base twice to receive physical therapy for knee problems.

c. Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family. *See* Title 18, United States Code, Section 3593(a) and *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597 (1991).

WHEREFORE, the United States of America, by and through the United States Attorney for the Northern District of Texas, hereby gives notice of its intent to seek the

death penalty as to **LOUIS JONES** and to introduce evidence to the jury in support of such punishment.

Respectfully submitted,

PAUL E. COGGINS
UNITED STATES ATTORNEY
/s/ Tanya K. Pierce
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INSTRUCTION No. 4

D. Government's Burden of Proof

The burden of proving that Louis Jones should be sentenced to death rests at all times with the government. If, after fair and impartial consideration of all the evidence in this case, any one of you is not persuaded that justice demands Mr. Jones's execution, then the jury must return a decision against capital punishment and must fix Mr. Jones' punishment at life in prison without any possibility of release.

INSTRUCTION NO. 5

E. Unanimity Required Only for Death Sentence

This second phase of the trial differs from the first. In the first phase, I instructed you to deliberate with the goal of reaching a unanimous decision – one way or the other – as to whether the government had proved the defendants guilty beyond a reasonable doubt of the crimes charged.

In this phase, I instruct you that unanimity beyond a reasonable doubt is required for you to sentence Louis Jones to death. But if any of you – even a single juror – is not persuaded beyond a reasonable doubt that Mr. Jones' execution is required in this case, then the entire jury must render a decision against his death. In that event, the jury must fix his punishment at life in prison without any possibility of release.

Again, unless all twelve members of the jury determine that Mr. Jones should receive the death penalty, I will impose a sentence of life imprisonment without possibility of release. In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release. In short, if you find that you are not unanimous in your views, you have reached a decision: namely, that the government has not met its burden of proof as to the death penalty.

In the event you are unable to agree on Life Without Possibility of Release or Death, but you are unanimous that the sentence should be not less than Life Without Possibility of Release, you should report that vote to the

Court and the Court will sentence the defendant to Life Without the Possibility of Release.

Now, the defendant at this hearing does not have to present any evidence. He does not have to prove to you that he should be permitted to live. He was, however, entitled to present any mitigating facts to you – that is, facts that favor a lesser punishment than death – should he choose to do so.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Criminal No. 5-95-CR-0047-C
vs.	)	
LOUIS JONES,	)	
Defendant.	)	

DEFENDANT'S PRELIMINARY OBJECTIONS TO THE COURT'S CHARGE

(Filed Nov. 1, 1995)

The Defendant submits the following objections and comments to the Court's Proposed Instructions.

(1) *The "intent" findings from 18 U.S.C. § 3591(a)(2) should not be designated as "aggravating factors."* They were so designated in 21 U.S.C. § 848(n)(1), but this was a constitutional flaw in the statue [sic], and Congress corrected it in 18 U.S.C. § 3591 by redesignating these findings as threshold or preliminary findings rather than as aggravation. Therefore the the [sic] Court should change both Part One of the Special Findings Form, and all instructions that refer to the intent findings as "category one aggravating factors."

The importance of this change is that the intent factors simply establish that the defendant is constitutionally eligible for the death penalty under the eighth amendment, and this eligibility should not be treated as a separate aggravating factor (let alone 4 separate ones)

weighing against the mitigating factors and in favor of the imposition of the death penalty. See *Arave v. Creech*, 113 S.Ct. 1534, 1542 (1993) (aggravating factor is invalid if it applies to every defendant eligible for the death penalty.). If the Court declines to remove the "aggravating" designation from these threshold findings, defendant objects (in addition to objections based on statutory construction and legislative intent) on the grounds that defendant's constitutional eligibility for the death penalty under *Enmund v. Arizona* and *Tison v. Arizona* (i.e. the fact that the defendant had sufficient homicidal intent to make him death-eligible under the eighth amendment) applies by definition to every death-eligible killing, and thus does not narrow the category of murderers punishable by death: this makes the weighing of these findings on death's side of the sentencing scale invalid under the principle of *Godfrey v. Georgia*, *Stringer v. Black*, and *Arave v. Creech* that aggravating factors in death penalty cases must genuinely and meaningfully narrow the universe of killings in which death may be imposed.

In addition, the Court should require the the [sic] jury to choose *one* intent factor, not all four. These four factors represent a descending scale of personal homicidal intent, and the jury should only take up each one after deciding that the government has failed to prove the preceding one. This approach avoids the danger (still present even if the instructions do not mislabel these findings as "aggravating") that the jury will be misled into supposing that a murder is more blameworthy if four different levels of culpability are all found to apply to the defendant's conduct.

(2) On the first page of the Court's Proposed Instructions and thereafter, wherever the phrase "Justify a sentence of death" is used, the words "rather than a sentence of life imprisonment without possibility of release or a lesser sentence" should be appended immediately afterwards. The terminology about "Justifying a sentence of death" originated with 21 U.S.C. § 848, which did not explicitly allow the jury to consider any alternative sentence, and raises the problem that a juror might think death was "Justified" even though life imprisonment would have been preferable. Since the new death procedures leave absolutely no doubt that the jury is supposed to be choosing between life and death rather than simply deciding whether death is "Justified," this point should be spelled out whenever the issue before the jury is characterized or described.

(3) The introductory charge refers to the jury's power to determine whether the defendant should be sentenced to death, but omits the other sentence(s). This omission should be corrected wherever it occurs, since the false impression left by the Court's Proposed Instructions that death is some sort of presumptive sentence.

(4) On the 6th page of the instructions, references to "category two" aggravating factors should be deleted, since as mentioned above the "category one" factors are not aggravating factors at all.

(5) *Heinous, atrocious and cruel.* There is no basis for assuming that serious physical abuse can be post-mortem. In addition, there is no evidence in this case to support this aggravator. Critical to its existence is the fact that the *killing* must be Heinous, Atrocious and Cruel.

The rape or any other sexual abuse should not count as giving rise to this aggravator because the sexual abuse was not the manner of death, and (b) the torture or physical abuse must have an independent motive to inflict suffering. It is not sufficient that the murder caused suffering, in the absence of a specific intent to cause suffering. This is so both as a matter of statutory construction and as an 8th Amendment claim under *Godfrey v. Georgia*.

(6) *Substantial planning.* The instructions on the "substantial planning and premeditation" aggravator are objectionable as erroneously and unconstitutionally overbroad and vague. First, the instruction is nothing more than ordinary premeditation. There seems to be no difference between this aggravator and the state of mind needed to establish ordinary first degree murder under 18 U.S.C. § 1111. Yet there must be some difference, both because Congress presumably intended this aggravator to mean something, and because the death penalty provision of § 1111 has been universally recognized (even by the U.S. Attorneys' Manual) to be unconstitutional under *Furman* absent some further narrowing – such as a heightened premeditation and planning requirement of 18 U.S.C. § 3593(c)(9). Stated another way, even if such an all-inclusive aggravator were constitutional under the Eighth amendment, it is at least true that Congress intended this aggravator to require heightened premeditation, rather than ordinary premeditation. The defendant submits that the appropriate resolution of this issue would be to adopt Instruction No. 9 in the Defendant's Requested Sentencing Instructions.

(7) *Nonstatutory aggravation.*

If the Jury is to make written findings on nonstatutory aggravation (as is undeniably required by 18 U.S.C. § 3593(d), it would be very unfair to fail to require corresponding written findings on statutory and nonstatutory mitigation as well. The idea that the jury must make such extensive findings on every aspect of the government's allegations, but need not list or even formally poll about or discuss any of the mitigating factors submitted by the defense is manifestly unfair. The Court should require the jury to treat aggravating factors and mitigating factors even-handedly. Any failure to require similar treatment of aggravating factors and mitigating factors (i.e. written findings on both) implicitly minimizes mitigation and suggests that aggravation carries greater legal significance than mitigation, in violation of both Congressional intent of the eighth amendment principle of *Lockett v. Ohio.*

(8) *Nonstatutory aggravating factors.*

(a): Future dangerousness. Since the jury has an option of Life Without Possibility of Release, and there is no evidence that Louis Jones will be dangerous in prison, the Court should specify that this aggravator is relevant only to the question of whether a less-than-life sentence should be imposed, rather than life or death. Failing that, this aggravator should be stricken as unsupported by the evidence, and unduly prejudicial because it invites speculation on the nonexistent possibility that Louis Jones will be released from prison even if sentenced to life. *See generally, Simmons v. South Carolina.*

(b) Vulnerability. The Government has attempted to allege that the victim was somehow *particularly vulnerable,* in a fashion similar to 3592 (c)(11), owing to the various listed factors. However, the government's pretrial notice does not so allege, and the facts listed in the Court's Proposed Instructions do not on their face "aggravate" the murder in any meaningful way. There should be a limit to the number of special verdicts that the government is entitled to demand in a capital case: at this point, the effect is like requiring the jury to endorse every point of the prosecutor's final argument. Such a procedure – in which the jury is required to vote on and report is [sic] findings on every uncontested fact that helps the government's case for death, without any parallel requirement for voting on and returning special verdicts on life's side of the scales – has an obvious tendency to skew the jury's deliberative process towards death.

(c) Victim Characteristics. In this factor especially, the government has failed to allege any facts which "aggravate" the murder. Asking the jury unanimously and beyond a reasonable doubt to "find . . . the victim's characteristics," without any reference to what those characteristics might be, simply does not provide a task that the jury can perform in any rational manner. The same is also true regarding the aggravator that asked the jury to find Ms. McBride's "background" in aggravation. Likewise, the same effect of the offense on her family. As stated in the government's notice and in these proposed instructions, these allegations do not state anything capable of being found as a fact, beyond a reasonable doubt or otherwise. The jury has heard the evidence, the government will surely mention it in closing argument, but to

require the jury to "find" all these vague open-ended concepts really just invites it to consider the victim's and defendant's relative worth in deciding punishment, and to factor race into the sentencing calculus.

Both victim-based nonstatutory aggravators (a and b) should be stricken.

(9) *Mitigating factors.* The defendant objects to listing *all* the statutory mitigating factors in these instructions: the only effect of doing so is to pointlessly draw attention to the existence of mitigating factors that are concededly not present.

This part of the charge should simply be deleted, and the Court should continue on to give a single list of statutory and nonstatutory mitigating factors, without differentiating between them or informing the jury that some are statutory and some are nonstatutory. Informing the jury of the difference between statutory and nonstatutory mitigating factors merely creates a problem which must then be corrected by careful admonitions that nonstatutory factors are to be given the same consideration as statutory factors. The underlying rationale for this approach is that of *Lockett* and *Hitchock v. Dugger,* which forbids statutory limitation of relevant aggravating factors in capital cases.

(10) *Weighing process.* The defendant objects to the language about deciding whether death is "justified". This should be modified to make clear that the jury is choosing between punishments, more than one of which might be "justified."

(11) Anti-Sympathy. Defendant objects to the instruction on the jury's duty to avoid "any influence of passion, prejudice or sympathy. " The problem with such instructions is that they can be interpreted to prohibit sympathy for the defendant even when such sympathy is based entirely on the evidence. While the Supreme Court did uphold a somewhat similar instruction in *California v. Brown,* the instruction in that case referred to "mere . . . sympathy," and did not caution against *any* influence of sympathy. The Court's formulation here is more likely to be understood in its unconstitutional sense of limiting the effect to be given to mitigation.

On the other hand, it is proper for the jury not to be influenced by sympathy for the family of the victim. This problem may be resolved by an instruction on victim impact evidence as follows:

> You have heard testimony from a family member of the victim, Tracie Joy McBride. While this evidence was properly admitted in order to provide you with some information concerning Ms. McBride and concerning the effect of her death upon her family, I caution you that you are not to base your sentence on the feelings of any witness or on public opinion. Likewise, in determining whether to impose a death sentence, you must avoid any influence of passion, prejudice, or sympathy. Your deliberations should be based on the evidence you have seen and heard and the law on which I have instructed you.

Wherefore, Defendant prays that the Court grant the objections and modify the Court's Charge accordingly.

Respectfully submitted,

/s/ Carlton McLarty
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[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

(TITLE OMITTED IN PRINTING)

DEFENDANT'S OBJECTIONS TO THE COURT'S CHARGE (SENTENCING PHASE) (excerpted from Transcript of Separate Sentencing Hearing, Nov. 2, 1995, pp. 2702-2709)

* * *

[2702] THE COURT: ALL RIGHT. DOES THE DEFENDANT HAVE ANY OBJECTIONS OR REQUESTS?

MR. MCLARTY: YES, YOUR HONOR, WE DO. YOUR HONOR, PRIOR TO THE TIME THE COURT'S CHARGE IS READ TO THE JURY, WE WOULD OBJECT. AND AS I GO THROUGH MY OBJECTIONS, I WOULD LIKE TO JUST STATE AS A PRELIMINARY MATTER THAT THE BASIS OF OUR OBJECTIONS IN EACH AND EVERY OF THE FOLLOWING OBJECTIONS IS BASED UPON THE PROVISIONS OF THE FIFTH, SIXTH, EIGHTH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION. IN ADDITION, THE BASIS OF OUR OBJECTIONS ARE FROM THE STATUTORY LANGUAGE AND STATUTORY INTENT OF THE FEDERAL DEATH PENALTY ACT OF 1984.

ON PAGE ONE OF THE COURT'S INSTRUCTIONS, THE DEFENDANT OBJECTS TO THE LANGUAGE IN THE VERY FIRST PARAGRAPH WHERE IT STATES THAT IT WOULD BE THE JURY'S RESPONSIBILITY TO DETERMINE WHETHER THE DEFENDANT SHOULD BE SENTENCED TO DEATH. WE WOULD MOVE THAT

THE COURT ADD THE FOLLOWING LANGUAGE – "RATHER THAN LIFE WITHOUT POSSIBILITY OF RELEASE OR A LESSER SENTENCE."

IN THE BODY OF THE COURT'S INSTRUCTIONS WE WOULD MOVE THE COURT TO ADD THAT LANGUAGE EVERY TIME THE COURT STATES THAT THE JURY IS DETERMINING WHETHER THE DEFENDANT SHOULD BE SENTENCED TO DEATH, ADD THE LANGUAGE "RATHER THAN LIFE WITHOUT POSSIBILITY OF RELEASE OR A LESSER SENTENCE." AND WE WOULD MOVE THAT THAT LANGUAGE BE ADDED EACH AND EVERY TIME DURING THE [2703] BODY OF THE COURT'S INSTRUCTIONS WHEREIN THAT NOTED LANGUAGE IS USED.

NEXT, THE DEFENDANT OBJECTS TO THE PARAGRAPHS RELATING TO THE JURY'S FINDING OF INTENT. THIS WOULD BE ON PAGE FOUR OF THE COURT'S INSTRUCTIONS, GIVING THE JURY THE OPTION TO DECIDE BOTH THAT THE DEFENDANT INTENTIONALLY KILLED THE VICTIM TRACIE MCBRIDE, AND INTENTIONALLY INFLICTED SERIOUS BODILY INJURY THAT RESULTED IN THE DEATH OF THE VICTIM TRACIE MCBRIDE. WE WOULD URGE THE COURT TO INSERT AN "OR" IN BETWEEN THOSE TWO CLAUSES, THE REASON BEING THAT THOSE INTENT ELEMENTS ARE LISTED IN A DISSENTING ORDER OF CULPABLE MENTAL STATE AND IT IS ONLY NECESSARY TO CHOOSE ONE. BY GIVING THE JURY THE OPTION TO CHOOSE TWO, THIS HAS A DANGER OF MISLEADING THE JURY INTO SUPPOSING THE MURDER IS SOMEHOW

MORE BLAMEWORTHY IF TWO LEVELS OF CULPABILITY ARE FOUND TO APPLY TO THE DEFENDANT'S CONDUCT.

WE WOULD OBJECT TO THE COURT'S INSTRUCTIONS ON SERIOUS – WE WOULD OBJECT TO THE COURT'S INSTRUCTIONS ON SERIOUS PHYSICAL ABUSE REGARDING THE LANGUAGE THAT SUCH ABUSE MAY BE INFLICTED EITHER BEFORE OR AFTER DEATH AND DOES NOT REQUIRE THAT THE VICTIM BE CONSCIOUS OF THE ABUSE AT THE TIME IT WAS INFLICTED. WE FIND NO BASIS, NO EVIDENCE IN THIS CASE TO SUPPOSE THAT THERE WAS ANY ABUSE INFLICTED AFTER THE DEATH RESULTED.

WE OBJECT TO THE LANGUAGE ON SUBSTANTIAL [2704] PREMEDITATION AS BEING INADEQUATE AND TOO NARROW, PURSUANT TO THE CONSTITUTIONAL REQUIREMENTS OF THE EIGHTH AMENDMENT, FOR THE PENALTY OF DEATH IN THIS CASE. THE LANGUAGE AS TO SUBSTANTIAL PLANNING AND PREMEDITATION ARE INADEQUATE TO RAISE THAT AGGRAVATING FACTOR ABOVE THE LEVEL CONTEMPLATED PURSUANT TO 18 UNITED STATES CODE 1111. HOWEVER, THERE MUST BE SOME DIFFERENCE BECAUSE CONGRESS PRESUMABLY MEANT THIS AGGRAVATOR TO MEAN SOMETHING, AND THESE LISTED INSTRUCTIONS ARE INADEQUATE TO CONSTITUTIONALLY NARROW THAT PARTICULAR AGGRAVATING CIRCUMSTANCE.

THE DEFENDANT OBJECTS TO THE INCLUSION OF THE NONSTATUTORY AGGRAVATING FACTOR OF

FUTURE DANGEROUSNESS, BECAUSE THE EVIDENCE SIMPLY DOES NOT SUPPORT THAT INSTRUCTION BEING GIVEN TO THE JURY. THE GOVERNMENT'S OWN DOCTOR, DOCTOR MARTELL, STATED THE DEFENDANT WOULDN'T BE A FUTURE THREAT.

DEFENDANT OBJECTS TO THE NONSTATUTORY AGGRAVATING FACTOR NUMBER TWO AS BEING VAGUE AND INDEFINITE, ASKING THAT THE JURY SIMPLY FIND CERTAIN FACTS WITHOUT SPECIFYING HOW IN ANY WAY THE EXISTENCE OF THOSE PARTICULAR FACTS AGGRAVATE THE KILLING IN THIS PARTICULAR CASE.

THE SAME OBJECTION WOULD APPLY TO THE NONSTATUTORY AGGRAVATING FACTOR NUMBER THREE REGARDING PERSONAL CHARACTERISTICS WITHOUT ANY STATEMENT AS TO ALLOW THE JURY TO REFERENCE WHAT THOSE CHARACTERISTICS MIGHT BE. THAT SIMPLY DOES NOT PROVIDE A TASK THE JURY CAN PERFORM IN ANY RATIONALE [2705] MANNER. THEY DO NOT STATE ANYTHING THAT ARE BEING CAPABLE OF BEING FOUND AS A FACT. WE WOULD MOVE THAT BOTH OF THOSE TWO NONSTATUTORY FACTORS SIMPLY BE STRICKEN FROM THE COURT'S CHARGE.

IN REGARD TO THE LISTING OF MITIGATING FACTORS, WE WOULD DIRECT THE COURT'S ATTENTION TO THE TENDERED PENALTY PHASE MITIGATING FORM FILED BY THE DEFENDANT ON

NOVEMBER 1ST, 1995, AND WOULD MOVE TO SUBSTITUTE THOSE INSTRUCTIONS IN THEIR ENTIRETY FOR THE LISTED FACTORS STATED BY THE COURT.

FURTHER, LET ME GO THROUGH THE VERDICT FORM REGARDING THE SPECIAL FINDINGS FORM. WE WOULD OBJECT IN THE SPECIAL FINDINGS FORM ON PART ONE, AND WOULD MOVE THAT THE COURT ADD AN "OR" AND AN INSTRUCTION IN BETWEEN CLAUSE 1-A AND 1-B THAT THE JURY IS ONLY TO FIND ONE OF SUCH FINDINGS.

DEFENDANT ALSO OBJECTS TO THE LACK OF ANY DEFINITION IN THE COURT'S INSTRUCTIONS OR IN THE VERDICT FORM REGARDING THE DEFINITION OF KNOWINGLY CREATING A GRAVE RISK OF DEATH TO ONE OR MORE PERSONS. THIS PHRASE IS VAGUE AND CONSTITUTIONALLY AMBIGUOUS. ALSO IT IS NOT SUPPORTED BY THE EVIDENCE IN THE CASE, PARTICULARLY WITH THE EVIDENCE OF THE FORENSIC PATHOLOGIST WHO FOUND AND TESTIFIED THAT MR. PEACOCK, HIS INJURIES WERE NOT SERIOUS. SO WE WOULD OBJECT TO ANY SITUATION OF THAT ISSUE TO THE JURY.

WE OBJECT TO THE FAILURE TO INSTRUCT THE JURY ON THE DEFINITION OF FUTURE DANGEROUSNESS, LIMITING SUCH FUTURE [2706] DANGER TO THE CONTEMPLATED CONDUCT OF THE DEFENDANT IN SOLELY A PRISON ENVIRONMENT, SINCE THAT WOULD BE THE ONLY POSSIBILITY IN WHICH HE COULD BE PRESENT ANY DANGER, EVEN THOUGH THE GOVERNMENT'S OWN DOCTOR HAS STATED HE WOULD NOT PRESENT SUCH A THREAT.

AGAIN WE WOULD REITERATE OUR OBJECTIONS TO THE VAGUENESS AND THE LACK OF ANY MEANINGFUL FACT FINDING ON NONSTATUTORY AGGRAVATING FACTORS 3-B AND 3-C ON THE MITIGATING FACTORS, AGAIN PART FOUR, AND MOVE THAT THE DEFENDANT'S TENDERED PENALTY PHASE MITIGATION VERDICT FORM BE SUBMITTED SUBSTITUTED IN ITS ENTIRETY.

WE WOULD ALSO LIKE TO DIRECT THE COURT'S ATTENTION TO THE DEFENDANT'S REQUESTED SENTENCING INSTRUCTIONS FILED ON NOVEMBER 1ST, AND PARTICULARLY DIRECT THE COURT'S ATTENTION AND MOVE FOR THE INCLUSION OF INSTRUCTION NUMBER FIVE WHICH SPECIFICALLY INSTRUCTS THE JURY THAT UNANIMITY IS REQUIRED ONLY FOR A DEATH SENTENCE, AND WE WOULD MOVE THAT THE JURY BE SPECIFICALLY INSTRUCTED THAT IF THEY ARE UNABLE TO AGREE ON A DEATH VERDICT, THAT THE COURT WOULD THEN IMPOSE A LIFE WITHOUT POSSIBILITY OF RELEASE SENTENCE OR A LESSER SENTENCE.

WE WOULD MOVE THAT OUR INSTRUCTION NUMBER SIX FILED ON NOVEMBER 1ST SPECIFICALLY STATING IN SOMEWHAT MORE DETAIL THAT A DEATH SENTENCE IS NEVER REQUIRED.

WE WOULD MOVE FOR THE INCLUSION IN ITS ENTIRETY [2707] OF OUR INSTRUCTION NUMBER NINE REGARDING SUBSTANTIAL PLANNING AND PREMEDITATION.

WE WOULD MOVE FOR THE INCLUSION OF OUR PROPOSED INSTRUCTION NUMBER 16 FILED ON

NOVEMBER 1ST REGARDING THE WEIGHING OF THE AGGRAVATING AND MITIGATING FACTORS, INSTRUCTING THE JURY IN DETAIL AS TO THE FACTORS AND THE SERIOUSNESS OF THE WEIGHING FUNCTION THAT THEY ARE TO BE ENGAGED IN, AND PARTICULARLY THE FINDING AND INSTRUCTION THAT EACH JUROR MUST DECIDE WHETHER THE LAW REQUIRES THAT LOUIS JONES BE PUT TO DEATH OR NOT. AND IF EVEN ONE JUROR FINDS A MITIGATING FACTOR PRESENT WHICH IN THAT JUROR'S MIND IS NOT OUTWEIGHED BY THE AGGRAVATING FACTORS PROVED, THEN THE JURY MAY NOT SENTENCE LOUIS JONES TO DEATH.

WE WOULD ALSO MOVE FOR THE INCLUSION IN ITS ENTIRETY WHERE THEY DIFFER IN ANY WAY FROM THE COURT'S INSTRUCTIONS, EACH AND EVERY INSTRUCTION LISTED IN OUR SENTENCING INSTRUCTIONS FILED ON NOVEMBER 1ST.

I WOULD ALSO LIKE TO DIRECT THE COURT'S ATTENTION TO THE TENDERED PENALTY PHASE INSTRUCTIONS FILED ON OCTOBER 6TH BEFORE THE TRIAL BEGAN. ALSO, YOUR HONOR, IT JUST OCCURRED TO US, WE FAILED TO MENTION THIS IN OUR CHARGE CONFERENCE, AND I APOLOGIZE. IT APPEARS THAT WE SHOULD IN FACT HAVE A COURT'S INSTRUCTION AT THIS PHASE OF THE TRIAL ON THE DEFENDANT'S RIGHT NOT TO TESTIFY. SUCH A PROPOSED CHARGE HAS BEEN SUBMITTED, AND I APOLOGIZE FOR OVERLOOKING THAT IN OUR [2708] CONFERENCE. A SUITABLE

CHARGE WOULD BE CONTAINED IN THE INSTRUCTION NUMBER 24 FILED IN THE TENDERED PENALTY PHASE INSTRUCTIONS ON OCTOBER 6TH.

THE COURT: ALL RIGHT. IF MY SECRETARY IS LISTENING, I AM GOING TO ASK HER TO GO AHEAD AND PREPARE OUR STANDARD INSTRUCTION ON THE FACT THE JURY CANNOT TAKE INTO ACCOUNT THE FACT THAT THE DEFENDANT MAY NOT HAVE TESTIFIED.

MR. MCLARTY: WE WOULD MOVE THE ADOPTION OF OUR PROPOSED INSTRUCTION NUMBER 25 IN OUR OCTOBER 6TH FILING CONCERNING THE JURY'S EFFECT TO DISREGARD SPECULATION ABOUT THE ALLEGED DETERRENT EFFECT OF THE DEATH PENALTY.

WE WOULD MOVE THE ADOPTION IN WHOLE OF OUR PROPOSED INSTRUCTION NUMBER 26 FILED OCTOBER 6TH REGARDING THE DUTY TO CONSIDER MITIGATING CIRCUMSTANCES.

MR. HURLEY HAS BROUGHT SOMETHING ELSE TO MY ATTENTION. IN THE COURT'S INSTRUCTIONS TO THE JURY ON THE PAGE DISCUSSING, PAGE TEN OF THE COURT'S INSTRUCTIONS BEGINNING WITH THE PHRASE "THE DEFENDANT HAS ALLEGED VARIOUS MITIGATING FACTORS IN THIS CASE. EACH OF YOU MAY CONSIDER–" WE WOULD MOVE THE COURT TO CHANGE THE WORD "MAY" TO "MUST" OR "SHALL" IN THAT PARAGRAPH, AS WELL AS THE NEXT PARAGRAPH WHICH SAYS, "SOME OF THE MITIGATING FACTORS YOU MAY CONSIDER." WE WOULD MOVE THE COURT TO CHANGE THAT

"MAY" TO "MUST" AND "SHALL" IN ACCORDANCE WITH THE STATUTORY ACT, AND THE CONSTITUTIONAL PROVISIONS WHICH WE HAVE PREVIOUSLY MENTIONED.

[2709] WE WOULD ALSO MOVE THE COURT TO ADOPT IN ITS ENTIRETY OUR INSTRUCTION NUMBER 28 FILED ON OCTOBER 6TH REGARDING THE EFFECT AND FAILURE TO ARRIVE AT A UNANIMOUS DECISION AS TO THE PENALTY OF DEATH. AND JUST TO REITERATE, EACH AND EVERY OF THE PRECEDING OBJECTIONS HAS BEEN MADE UNDER THE PROVISIONS OF THE FIFTH, SIXTH, EIGHTH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AS WELL AS THE STATUTORY LANGUAGE OF THE FEDERAL DEATH PENALTY ACT OF 1994, AND THE STATUTORY INTENT OF THAT STATUTE.

THE COURT: ALL RIGHT. WITH THE EXCEPTION OF THE CHARGE ON THE DEFENDANT'S NOT TESTIFYING WHICH I WILL INCLUDE, I AM GOING TO OVERRULE THE OBJECTIONS.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO.
LOUIS JONES -	)	5:95-CR-047-C

COURT'S INSTRUCTIONS TO THE JURY

(Filed Nov. 3, 1995)

Members of the jury, as reflected by your verdict, you have unanimously found the defendant guilty of the offense with which he was charged in Count One of the indictment. The law of the United States provides that the punishment for the offense in Count One may be death. As members of the jury, it will be your responsibility to determine whether the defendant should be sentenced to death on Count One.

In making this determination, you will be called upon to decide whether certain aggravating factors exist and, if so, whether those aggravating factors sufficiently outweigh any mitigating factor or factors found to exist or, in the absence of any mitigating factors, whether the aggravating factors alone are sufficient to justify a sentence of death. An aggravating factor is a specified fact or circumstance which might indicate, or tend to indicate, that the defendant should be sentenced to death. A mitigating factor is any aspect of a defendant's character or background, any circumstance of the offense, or any other fact or circumstance which might indicate, or tend

to indicate, that the defendant should not be sentenced to death.

In deciding whether aggravating or mitigating factors exist, you may consider any evidence that was presented during the guilt phase of the trial that is relevant to your inquiry regarding the existence of aggravating or mitigating factors. You may also consider any evidence that the parties presented at this sentencing hearing that is relevant to your consideration of whether aggravating or mitigating factors exist. "Relevant evidence" means evidence having any tendency to make the existence of any fact or circumstance that is of consequence to such determination more probable than it would be without the evidence. You may also make deductions and reach conclusions that reason and common sense lead you to draw from facts which have been established from the testimony and other evidence in the case. You should also consider both direct and circumstantial evidence. While you must consider all the evidence, you are not required to accept any of the evidence as true or accurate. You alone determine issues of credibility and how much weight, if any, to give testimony and other evidence.

The law does not require a defendant to produce any evidence at all and no inference whatever may be drawn from the election of a defendant not to testify.

The government bears the burden of proving beyond a reasonable doubt the existence of any aggravating factor upon which it seeks to rely. While this burden is a heavy one, it is not necessary that a particular aggravating factor be proved beyond all possible doubt. It is only

required that the government's proof exclude any "reasonable doubt" about the particular aggravating factor being considered. A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. The defendant does not have the burden of disproving the existence of any aggravating factor. The law does not require the defendant to produce any evidence at all. The burden is wholly upon the government to prove the existence of a particular aggravating factor beyond a reasonable doubt.

Under the law of the United States, there are statutory aggravating factors and there are also non-statutory aggravating factors. Before you may consider aggravating (statutory and nonstatutory) and mitigating factors and whether the penalty of death is an appropriate punishment in this case for the defendant, you must as a preliminary matter unanimously agree that the government has proved beyond a reasonable doubt the existence of at least one of the following circumstances with regard to the intent of the defendant as it relates to the death of Tracie Joy McBride:

The defendant, Louis Jones:

(1) intentionally killed the victim, Tracie Joy McBride;

(2) intentionally inflicted serious bodily injury that resulted in the death of the victim, Tracie Joy McBride;

If the government does not satisfy each of you beyond a reasonable doubt, based on the evidence at trial and the evidence at this hearing, that at least one of these circumstances is true, you should return a finding to that effect, and no further deliberations will be necessary.

However, if you unanimously find beyond a reasonable doubt that at least one of the circumstances listed above has been established, you will then proceed to determine whether the government has proven beyond a reasonable doubt the existence of any of the alleged statutory aggravating factors.

In this case, the government has alleged as statutory aggravating factors that:

a) the defendant caused the death or injury resulting in the death of Tracie Joy McBride during the commission of the offense of kidnapping;

b) the defendant, in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense, Tracie Joy McBride;

c) the defendant committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture and serious physical abuse to the victim, Tracie Joy McBride; and

d) the defendant committed the offense after substantial planning and premeditation to cause the death of Tracie Joy McBride;

To establish that the defendant killed the victim in an especially heinous, cruel, or depraved manner, the government must prove that the killing involved either torture *or* serious physical abuse to the victim. The terms

"heinous, cruel, or depraved" are stated in the disjunctive: any one of them individually may constitute an aggravating circumstance warranting imposition of the death penalty.

"Heinous" means extremely wicked or shockingly evil, where the killing was accompanied by such additional acts of torture or serious physical abuse of the victim as to set it apart from other killings.

"Cruel" means that the defendant intended to inflict a high degree of pain by torturing the victim in addition to killing the victim.

"Depraved" means that the defendant relished the killing or showed indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.

"Torture" includes mental as well as physical abuse of the victim. In either case, the victim must have been conscious of the abuse at the time it was inflicted; and the defendant must have specifically intended to inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

"Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse – unlike torture – may be inflicted either before or after death and does not require that the victim be conscious of the abuse at the time it

was inflicted. However, the defendant must have specifically intended the abuse apart from the killing.

Pertinent factors in determining whether a killing was especially heinous, cruel, or depraved include: infliction of gratuitous violence upon the victim above and beyond that necessary to commit the killing; needless mutilation of the victim's body; senselessness of the killing; and helplessness of the victim.

The word "especially" should be given its ordinary, everyday meaning of being highly or unusually great, distinctive, peculiar, particular, or significant.

To establish the existence of the factor of substantial planning and premeditation, the government must prove that the defendant killed the victim after substantial planning *and* premeditation. The words "substantial planning and premeditation" should be given their ordinary, everyday meaning. "Planning" means mentally formulating a method for doing something or achieving some end. "Premeditation" means thinking or deliberating about something and deciding whether to do it beforehand. "Substantial planning and premeditation" is not established by simply showing that a murder was premeditated, nor that some small amount of planning preceded it. Rather, it must be shown that there was both a considerable amount of premeditation *and* that there was a considerable amount of planning preceding the murder.

If the government does not satisfy each of you beyond a reasonable doubt that at least one of these statutory aggravating factors exists you should return a finding to that effect, and no further deliberations will be necessary.

In the event that you unanimously find that the government has proven beyond a reasonable doubt the existence of at least one of the circumstances with regard to the intent of the defendant relating to the death of Tracie Joy McBride and the existence of at least one of the statutory aggravating factors, then you must consider whether the government has proved beyond a reasonable doubt the existence of any non-statutory aggravating factors. As is the case for the statutory aggravating factors, you must unanimously agree on the existence of any of the alleged nonstatutory aggravating circumstances.

The non-statutory aggravating factors that the government has alleged in this case are:

(1) the defendant's future dangerousness to the lives and safety of other persons;

(2) Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas;

(3) Tracie Joy McBride's personal characteristics and the affect of the instant offense on Tracie Joy McBride's family.

Like the statutory aggravating factors, the government bears the burden of proving beyond a reasonable doubt the existence of any of these non-statutory aggravating factors.

Whether any aggravating factor – statutory or non-statutory – has been sufficiently established is for you alone to determine, but the only aggravating factors that you may take into account are those that I have outlined for you in these instructions.

In the event that the government proves beyond a reasonable doubt the existence of aggravating factors as outlined above, you must then consider whether the defendant has proved the existence of any mitigating factors, before you may consider whether the penalty of death is an appropriate punishment in this case for the defendant.

The burden of establishing the existence of any mitigating factor is on the defendant. The defendant need only establish the existence of a mitigating factor by a preponderance of the evidence, rather than beyond a reasonable doubt. A "preponderance of the evidence" simply means an amount of evidence that is enough to persuade you that a contention is more likely true than not true or that a mitigating factor is more likely present than not present.

The defendant has alleged various mitigating factors in this case. Each of you must consider any mitigating factor you, as an individual, find has been established by a preponderance of the evidence that relates to any aspect of the defendant's character or background, any circumstance of the offense, or any other fact or circumstance, which you, as an individual, conclude indicates or tends to indicate that the defendant should not be sentenced to death.

Some of the mitigating factors that you must consider are the following, but remember you are not confined to only those mitigating factors hereinafter listed:

(1) that the defendant Louis Jones did not have a significant prior criminal record;

(2) that the defendant Louis Jones' capacity to appreciate the wrongfulness of the defendant's conduct or to conform to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge;

(3) that the defendant Louis Jones committed the offense under severe mental or emotional disturbance;

(4) that the defendant Louis Jones was subjected to physical, sexual, and emotional abuse as a child (and was deprived of sufficient parental protection that he needed);

(5) that the defendant Louis Jones served his country well in Desert Storm, Grenada, and for 22 years in the United States Army;

(6) that the defendant Louis Jones is likely to be a well-behaved inmate;

(7) that the defendant Louis Jones is remorseful for the crime he committed;

(8) that the defendant Louis Jones' daughter will be harmed by the emotional trauma of her father's execution;

(9) that the defendant Louis Jones was under unusual and substantially internally generated duress and stress at the time of the offense;

(10) that the defendant Louis Jones suffered from numerous neurological or psychological disorders at the time of the offense;

(11) that other factors in the defendant's background or character mitigate against the death penalty.

You will also recall that I previously told you that all twelve of you had to unanimously agree that a particular aggravating circumstance was proved beyond a reasonable doubt before you consider it. Quite the opposite is true with regard to mitigating factors. A finding with respect to a mitigating factor may be made by any one or more of the members of the jury, and any member who finds by a preponderance of the evidence the existence of a mitigating factor may consider such factor established for his or her weighing of aggravating and mitigating factors regardless of the number of other jurors who agree that such mitigating factor has been established.

After you have completed your findings as to the existence or absence of any aggravating or mitigating factors, you will then engage in a weighing process. In determining whether a sentence of death is appropriate, you must weigh any aggravating factors that you unanimously find to exist – whether statutory or nonstatutory – against any mitigating factors that any of you find to exist. You shall consider whether all the aggravating factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence.

If you unanimously conclude that the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of

any mitigating factors, that the aggravating factors are themselves sufficient to justify a sentence of death, you may recommend a sentence of death. Keep in mind, however, that regardless of your findings with respect to aggravating and mitigating factors, you are never required to recommend a death sentence.

If you recommend the imposition of a death sentence, the court is required to impose that sentence. If you recommend a sentence of life without the possibility of release, the court is required to impose that sentence. If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended.

In reaching your findings about the aggravating and mitigating factors in this case, the instructions I gave you prior to your deliberations at the guilt phase about determinations of credibility issues apply equally here. In other words, you alone determine the credibility of the witnesses and the weight to give to this testimony and the other evidence. Also, in determining whether to recommend a death sentence, you must avoid any influence of passion or prejudice. Your deliberations should be based upon the evidence you have seen and heard and the law on which I have instructed you.

The process of weighing aggravating and mitigating factors against each other or weighing aggravating factors alone, if there are no mitigating factors, in order to determine the proper punishment is not a mechanical process. In other words, you should not simply count the number of aggravating and mitigating factors and reach a decision based on which number is greater; you should consider the weight and value of each factor.

The law contemplates that different factors may be given different weights or values by different jurors. Thus, you may find that one mitigating factor outweighs all aggravating factors combined. If so, you should recommend that a sentence of death not be imposed. Similarly, you may find that a particular aggravating factor outweighs all mitigating factors combined. If so, you may recommend that a sentence of death be imposed. You and you alone, are to decide what weight or value is to be given to a particular factor in your decision-making process.

In order to bring back a verdict recommending the punishment of death or life without the possibility of release, all twelve of you must unanimously vote in favor of such specific penalty.

Government's Exhibit 10 has been identified as a typewritten transcript of an oral conversation which can be heard on the tape recording received in evidence. The transcript also purports to identify the speakers engaged in such conversation.

I have admitted the transcript for the limited and secondary purpose of aiding you in following the content

of the conversation as you listen to the tape recording, and also to aid you in identifying the speakers.

However, you are specifically instructed that whether the transcript correctly or incorrectly reflects the content of the conversation or the identity of the speakers is entirely for you to determine based upon your own evaluation of the testimony you have heard concerning the preparation of the transcript, and from your own examination of the transcript in relation to your hearing of the tape recording itself as the primary evidence of its own contents; and, if you should determine that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

It is your duty as jurors to discuss the issue of punishment with one another in an effort to reach agreement, if you can do so. Each of you must decide this remaining question for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing this matter, do not hesitate to reexamine your own opinion, and to change your mind if you become convinced that you are wrong. But do not give up your honest beliefs as to the weight or the effect of the evidence solely because others think differently or simply to get the case over with.

In your consideration of whether the death sentence is justified, you must not consider the race, color, religious beliefs, national origin, or sex of either the defendant or the victim. You are not to recommend a sentence of death unless you have concluded that you would impose a sentence of death for the crime in question no matter what the race, color, religious beliefs, national

origin, or sex of either the defendant or the victim would have been.

To emphasize the importance of this consideration, when you retire to begin deliberations, you will be given decision forms which contain a certificate that must be signed by each juror. When you have reached a decision, each of you is to sign the certificate – but only if this is so – attesting that considerations of race, color, religious beliefs, national origin, or sex of the defendant or the victim were not involved in reaching your decision, and attesting that you would have imposed a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or the victim would have been.

As you retire to begin your deliberations, you will be provided with a form entitled "Special Findings" on which you should record your determinations as to the existence or non-existence of any aggravating factor. You will also be provided with four forms entitled "Decision Form A, B, C, and D" on which you will record your decision regarding your sentencing recommendation. The forms are self-explanatory: Decision Form A should be used if you determine that a sentence of death should not be imposed because the government failed to prove beyond a reasonable doubt the existence of the required intent on the part of the defendant or a required aggravating factor. Decision Form B should be used if you unanimously recommend that a sentence of death should be imposed. Decision Form C or Decision Form D should be used if you determine that a sentence of death should not be imposed because: (1) you do not unanimously find

that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist; or (2) you do not unanimously find that the aggravating factor or factors found to exist are themselves sufficient to justify a sentence of death where no mitigating factor has been found to exist; or (3) regardless of your findings with respect to aggravating and mitigating factors you are not unanimous in recommending that a sentence of death should be imposed. Decision Form C should be used if you unanimously recommend that a sentence of imprisonment for life without the possibility of release should be imposed.

Decision Form D should be used if you recommend that some other lesser sentence should be imposed.

The first thing you should do is select a foreperson who may be the same one that served you during the quilt [sic] phase, or someone else. He or she will preside over your deliberations and will speak for you here in court.

If you should desire to communicate with me at any time during your deliberations, please write down your message or question and pass the note to the marshal who will bring it to my attention.

I shall respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you orally.

I caution you, however, with any message or question you might send, that you should not tell me your numerical division at that time.

It is proper again to add a final caution. Nothing that I have said in these instructions – and nothing that I have said or done during the trial – has been said or done to suggest to you what I think your decision should be. What decision should be is your exclusive duty and responsibility

November 2, 1995
Date

/s/ Illegible
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO.
v.	)	5:95-CR-047-C
LOUIS JONES	)	

SPECIAL FINDINGS FORM

(Filed Nov. 3, 1995)

I. PART ONE

CIRCUMSTANCES WITH REGARD TO THE INTENT OF THE DEFENDANT AS IT RELATES TO THE DEATH OF TRACIE JOY MCBRIDE

Instructions: For each of the following, answer "YES" or "NO" as to whether you, the jury, unanimously find that the government has established the existence of that circumstance relating to the intent of the defendant beyond a reasonable doubt:

1(A). The defendant LOUIS JONES intentionally killed Tracie Joy McBride.

Unanimously YES /s/ Jean Tripp
Foreperson

NO _____
Foreperson

1(B). The defendant LOUIS JONES intentionally inflicted serious bodily injury which resulted in the death of Tracie Joy McBride.

Unanimously YES /s/ Jean Tripp
Foreperson

NO _____
Foreperson

Instructions: If you answered "NO" with respect to both of the questions relating to the intent of the defendant in Section I above, then stop your deliberations, fill out Decision Form A, and advise the court that you have reached a decision.

If you answered "YES" with respect to one or both of the questions relating to the intent of the defendant in Section I above, then continue your deliberations in accordance with the court's instructions and proceed to Part II which follows.

II. PART TWO

AGGRAVATING FACTORS

Instructions: For each of the following, answer "YES" or "NO" as to whether you, the jury, unanimously find that the government has established the existence of that aggravating factor beyond a reasonable doubt:

2(A). The defendant LOUIS JONES caused the death of Tracie Joy McBride, or injury resulting in the death of Tracie Joy McBride, which occurred during the commission of the offense of Kidnapping.

Unanimously YES /s/ Jean Tripp
Foreperson

NO _____
Foreperson

2(B). The defendant, in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense, Tracie Joy McBride.

Unanimously YES _____
Foreperson

NO /s/ Jean Tripp
Foreperson

2(C). The defendant LOUIS JONES committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse to Tracie Joy McBride.

Unanimously YES /s/ Jean Tripp
Foreperson

NO _____
Foreperson

2(D). The defendant LOUIS JONES committed the killing of Tracie Joy McBride after substantial planning and premeditation to cause the death of Tracie Joy McBride.

Unanimously YES _____
Foreperson

NO /s/ Jean Tripp
Foreperson

Instructions: If you answered "NO" with respect to all of the Aggravating Factors in Section II above, then stop your deliberations, fill out Decision Form A, and advise the court that you have reached a decision.

If you answered "YES" to at least one question relating to the intent of the defendant in Section I, and at least one aggravating factor in Section II, then continue your deliberations in accordance with the court's instructions and proceed to Section III which follows. Otherwise, fill out Decision Form A and advise the court that you have reached a decision.

III. PART THREE
NON-STATUTORY AGGRAVATING FACTORS

Instructions: For each of the following, answer "YES" or "NO" as to whether you, the jury, unanimously find that the government has established the existence of that aggravating factor beyond a reasonable doubt:

3(A). The defendant constitutes a future danger to the lives and safety of other persons as evidenced by specific acts of violence by the defendant LOUIS JONES.

Unanimously YES _____
Foreperson

NO /s/ Jean Tripp
Foreperson

3(B). Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas.

Unanimously YES /s/ Jean Tripp
Foreperson

NO _____
Foreperson

3(C). Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family constitute an aggravating factor of the offense.

Unanimously YES /s/ Jean Tripp
Foreperson

NO _____
Foreperson

Instructions: Regardless of whether you answered "YES" or "NO" with respect to the Non-Statutory Aggravating Factors in Part III above, continue your deliberations in accordance with the court's instructions and proceed to Section IV which follows.

IV. PART FOUR
MITIGATING FACTORS

Instructions: For each of the following mitigating factors, you should indicate, in the space provided, the number of jurors who have found the existence of that mitigating factor to be proven by a preponderance of the evidence.

A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and *any member of the jury who finds the existence of a mitigating factor may consider such a factor established in considering whether or not a sentence of death shall be imposed,* regardless of the number of other jurors who concur that the factor has been established.

1. That the defendant Louis Jones did not have a significant prior criminal record.

Number of jurors who so find 6

2. That the defendant Louis Jones' capacity to appreciate the wrongfulness of the defendant's conduct or to conform to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

Number of jurors who so find 2

3. That the defendant Louis Jones committed the offense under severe mental or emotional disturbance.

Number of jurors who so find 1

4. That the defendant Louis Jones was subjected to physical, sexual, and emotional abuse as a child (and was deprived of sufficient parental protection that he needed).

Number of jurors who so find 4

5. That the defendant Louis Jones served his country well in Desert Storm, Grenada, and for 22 years in the United States Army.

Number of jurors who so find 8

6. That the defendant Louis Jones is likely to be a well-behaved inmate.

Number of jurors who so find 3

7. That the defendant Louis Jones is remorseful for the crime he committed.

Number of jurors who so find 4

8. That the defendant Louis Jones' daughter will be harmed by the emotional trauma of her father's execution.

Number of jurors who so find 9

9. That the defendant Louis Jones was under unusual and substantially internally generated duress and stress at the time of the offense.

Number of jurors who so find 3

10. That the defendant Louis Jones suffered from numerous neurological or psychological disorders at the time of the offense.

Number of jurors who so find 1

11. That other factors in the defendant's background or character mitigate against the death penalty.

Number of jurors who so find 0

The following extra spaces are provided to write in additional mitigating factors, if any, found by any one or more jurors. If none, write "NONE" and line out the extra spaces with a large "X". If more space is needed, write "CONTINUED" and use the reverse side of this page.

12. /s/ Sandy Lane .

Number of jurors who so find 7

__. _____.

Number of jurors who so find X

__. _____.

Number of jurors who so find X

__. _____.

Number of jurors who so find X

Instructions: Before continuing, all jurors should sign below if this Special Findings Form accurately reflects the findings of the Jury as a whole to this point. You should then continue your deliberations in accordance with the court's instructions by filling out either Decision Form B recommending death, or Decision Form

C recommending a life sentence without the possibility of release, or Decision Form D recommending some other lesser sentence. After filling out the appropriate Decision Form, complete the document entitled "Certification", and advise the court that you have reached a decision.

SIGNATURE OF JURORS

/s/ J. Robert Jowers	/s/ Bill Illegible
/s/ Marsha Lovelady	/s/ Illegible
/s/ Cassandra Hastings	/s/ Linda J. Sadler
/s/ Joyce Lockhart	/s/ Illegible
/s/ Mary Jo Martin	/s/ Christie Beauregard
/s/ Jean Tripp	(Charlotte)
FOREPERSON	/s/ Lucy Illegible

Date: November 3, 1995

DECISION FORM A

We the jury have determined that a sentence of death should not be imposed because the government has failed to prove beyond a reasonable doubt the existence of the required intent on the part of the defendant or a required aggravating factor.

_____

FOREPERSON

Date: November _____, 1995

DECISION FORM B

Based upon consideration of whether the aggravating factor or factors found to exist sufficiently outweigh any

mitigating factor or factors found to exist, or in the absence of any mitigating factors, whether the aggravating factor or factors are themselves sufficient to justify a sentence of death, we recommend, by unanimous vote, that a sentence of death be imposed.

SIGNATURE OF JURORS

/s/ J. Robert Jowers	/s/ Bill Illegible
/s/ Marsha Lovelady	/s/ Illegible
/s/ Cassandra Hastings	/s/ Linda J. Sadler
/s/ Joyce Lockhart	/s/ Illegible
/s/ Mary Jo Martin	/s/ Charlotte Beauregard
/s/ Jean Tripp	/s/ Lucy Illegible

FOREPERSON

Date: November 3, 1995

DECISION FORM C

We the jury recommend, by unanimous verdict, a sentence of life imprisonment without the possibility of release.

SIGNATURE OF JURORS

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

FOREPERSON

Date: November ____, 1995

DECISION FORM D

We the jury recommend some other lesser sentence.

_____

FOREPERSON

Date: November ____, 1995

CERTIFICATION

By signing below, each juror certifies that, in considering whether a sentence of death is justified, consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her individual decisions, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim would have been.

SIGNATURES OF JURORS

/s/ J. Robert Jowers	/s/ Bill Illegible
/s/ Marsha Lovelady	/s/ Illegible
/s/ Cassandra Hastings	/s/ Linda J. Sadler
/s/ Joyce Lockhart	/s/ Illegible
/s/ Mary Jo Martin	/s/ Charlotte Beauregard
/s/ Jean Tripp	/s/ Lucy Illegible

FOREPERSON

Date: November 3, 1995

_____

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Criminal No.
	)	5-95-CR-0047-C
LOUIS JONES,	)	
	)	
Defendant.	)	

MOTION FOR NEW TRIAL

(Filed Jan. 3, 1996)

The defendant, by counsel, pursuant to the Fifth, Sixth and Eighth Amendments to the United States Constitution, Rule 33 of the Rules of Criminal Procedure, and the provisions of 18 U.S.C. 3591 *et seq.*, moves the court to grant a New Trial in the above styled cause.

In support of his motion, defendant states as follows:

The defendant was assessed a sentence of death on November 3, 1995. The Court has extended until January 3, 1995 the time for filing a Motion for New Trial.

Jury Misconduct

Based on the statements of the juror herein, the jury was exposed to extrinsic evidence in that a juror expressed a misstatement of the law, asserted as fact, by one professing to know the law, which statement was relied on by other jurors, who for that reason changed their vote to a harsher punishment.

The misstatement related to an issue as to the need for unanimity in order to avoid the imposition of a "lesser sentence" as opposed to life without possibility of release.

A juror has informed counsel that lack of, and misunderstandings about, the jury instructions here played a critical role in the death verdict in this case. Attached hereto and incorporated herein is the affidavit of Daniel Salazar, Staff Investigator for the Federal Public Defender, who participated in an interview of a juror who contacted counsel following the trial. That juror stated in part as follows:

> They understood the instructions to mean that they had to be unanimous on both death and life without parole. The people who were 100% for the death penalty would not agree to sign off on the life without parole form.
>
> Based on her impressions it was apparent that during deliberations other jurors expressed an opinion that the result of a jury unable to reach a verdict between life without possibility of release and a death sentence would be that the court would impose a lesser sentence.
>
> She stated that there was considerable pressure in deliberations to prevent that outcome.
>
> She described the situation where they thought they would either have a hung jury or the Judge would impose a lesser sentence in the event of a hung jury. No one wanted to have Louis Jones receive a lesser sentence than life without possibility of release.

It is thus apparent that the fear that the court could impose a sentence of less than life without possibility of release if there was not a unanimous verdict was improperly used as leverage in overcoming the scruples of those jurors who reasonably felt that the appropriate punishment was life without release.

This critical misunderstanding violated the defendant's rights under the principles of *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994) to have his sentence determined under accurate and reliable standards and in accordance with the requirements of the 5th, 6th, and 8th Amendments of the United States Constitution.

Error in the Court's charge

The jury misconduct alluded to above is all the more relevant because the defendant specifically and timely presented to the court a proposed instruction and objection which would have clarified this point for the jury. In his proposed instructions submitted on November 1, 1995, the defendant requested a charge as follows:

INSTRUCTION NO. 5

E. Unanimity Recruited Only for Death Sentence

This second phase of the trial differs from the first. In the first phase, I instructed you to deliberate with the goal of reaching a unanimous decision – one way or the other – as to whether the government had proved the defendants guilty beyond a reasonable doubt of the crime charged.

In this phase, I instruct you that unanimity beyond a reasonable doubt is required for you to sentence Louis Jones to death. But if any of you – even a single juror – is not persuaded beyond a reasonable doubt that Mr. Jones' execution is required in this case, then the entire jury must render a decision against his death. In that event, the jury must fix his punishment at life in prison without any possibility of release.

Again, unless all twelve members of the jury determine that Mr. Jones should receive the death penalty, I will impose a sentence of life imprisonment without possibility of release. In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release. In short, if you find that you are not unanimous in your views, you have reached a decision: namely, that the government has not met its burden of proof as to the death penalty.

In the event you are unable to agree on Life Without Possibility of Release or Death, but you are unanimous that the sentence should be not less than Life Without Possibility of Release, you should report that vote to the court and the Court will sentence the defendant to Life Without the Possibility of Release.

Now, the defendant at this hearing does not have to present any evidence. He does not have to prove to you that he should be permitted to live. He was, however, entitled to present any mitigating facts to you – that is, facts that favor a lesser punishment than death – should he choose to do so. (emphasis added)

The court further erred by overruling the objections and failing to instruct the jury as to each and every objection and proposed instruction contained in the Tendered Penalty Phase Instructions filed on October 6, 1995, the Tendered Penalty Phase Mitigation Verdict Form filed November 1 1995, Defendant's Preliminary Objections to the Court's Charge filed November 1, 1995, and the Defendant's Requested Sentencing Instructions filed November 1, 1995.

As to each such objection and proposed instruction the defendant based his objection and request upon the provisions of the 5th, 6th, and 8th Amendments to the United States Constitution and the language and statutory intent of Federal Death Penalty Act of 1994.

* * *

Conclusion

The ~~sentence~~ of death was imposed under the influence of passion, prejudice, or other arbitrary factor.

WHEREFORE, the defendant prays:

(a) That the Court grant a New Trial in this cause and set aside the sentence of death; and

(b) Grant an evidentiary hearing to resolve the issues set forth herein; and

(c) Such other relief as may be appropriate.

Respectfully submitted,

/s/ Carlton McLarty
Carlton McLarty
Assistant Federal Public Defender
TBA #13740400
1205 Texas Avenue
Lubbock, Texas 79401
806-743-7236

/s/ Daniel W. Hurley by Illegible
Daniel W. Hurley
Hurley and Sowder
TBA #10310200
1703 Avenue K
Lubbock, Texas 79401
806-763-0409

CERTIFICATE OF CONFERENCE

I certify that I conferred with Tanya Pierce or Roger McRoberts, the Assistant U.S. Attorneys assigned to this matter, regarding the filing of the foregoing and they do ~~do not~~ oppose said motion.

/s/ Carlton McLarty
Carlton McLarty
Assistant Federal Public Defender

[Certificate Of Service Omitted In Printing]

EX. "A"

AFFIDAVIT

I, DANIEL SALAZAR, do hereby state the following:

My name is DANIEL SALAZAR. I am employed as an Investigator for the Federal Public Defender.

On November 8, 1995, a juror in the Louis Jones case called the office of the Federal Public Defender. The caller identified herself as juror Christie Beauregard. With the consent of the juror, she was placed on speakerphone and Daniel Salazar and Carlton McLarty participated in the conversation.

The juror expressed misgivings about the verdict.

She said that she'd been the next to last to change her mind. She described the initial vote as eight to four for the death penalty. She said the main thing that bothered her was that there was a lot of confusion about the Court's instructions. On Friday afternoon they thought they would be hung because they were not able to reach a unanimous verdict. They understood the instructions to mean that they had to be unanimous on both death and life without parole. The people who were 100% for the death penalty would not agree to sign off on the life without parole form.

During deliberations, it was her impression that other jurors expressed an opinion that the result of a jury unable to reach a verdict between life without possibility of release and a death sentence would be that the court would impose a lesser sentence.

She stated that there was considerable pressure in deliberations to prevent that outcome.

She described the situation where they thought they would either have a hung jury or the Judge would impose a lesser sentence in the event of a hung jury. No one wanted to have Louis Jones receive a lesser sentence than life without possibility of release.

They were taking secret ballots. When it got down to ten to two the other jurors asked who were the two that weren't voting for death and put them on the spot. She said that she hadn't decided. She thought that Louis would be okay in prison. But she also said that if she was the only one then she might change her mind but as long as there was someone else agreeing with her then she would not vote for the death penalty.

She said that at this point Cassandra Hastings, the lone black juror, began crying and stating that she could not impose the death penalty. Mrs. Beauregard then describes all the other jurors as "getting on her". That they were "pushing her hard" and that they were pressuring her until she finally said 'yes'. After that Mrs. Beauregard then changed her vote.

She said shortly before it reached this point they had almost decided it would be a hung jury and they were about to send a note out to the Judge asking for clarification about the instructions and what would happen if there was a hung jury. However, at this point the ten to two vote occurred and things went very fast from that point on.

She said some of the pro death jurors would have been willing and were willing to go along with life without possibility of release. She says that if the jury had known that if they were unable to reach a verdict between life without possibility of release and death that the Judge would have imposed a life without possibility of release sentence then she would not have agreed to vote for a death sentence. She believed other jurors shared that view.

/s/ Daniel Salazar
DANIEL SALAZAR

THE STATE OF TEXAS
COUNTY OF LUBBOCK

This instrument was acknowledged before me on Dec. 28, 1995 by DANIEL SALAZAR.

/s/ Dora M. Russell
Notary Public, State of Texas

[SEAL]
DORA M. RUSSELL
MY COMMISSION EXPIRES
October 20, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL NO.
v.	§	5:95-CR-047-C
	§	
LOUIS JONES	§	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR NEW TRIAL

(Filed Jan. 26, 1996)

COMES NOW the United States of America, by and through the United States Attorney for the Northern District of Texas, in the above entitled cause and files this response to Defendant's Motion for New Trial filed January 3, 1996, and in support thereof would show this Court as follows:

I. THERE WAS NO JURY MISCONDUCT

The Defendant's first ground for new trial is an allegation of jury misconduct based on a telephone call with a juror which Defendant contends shows that the "jury was exposed to extrinsic evidence in that a juror expressed a misstatement of the law, asserted as fact, by one professing to know the law, which statement was relied on by other jurors, who for that reason changed their vote to a harsher punishment."

The juror's alleged comments show no more than, at most, a misunderstanding of the Court's instructions, or confusion by the jury concerning the Court's instructions

as to the law. Such a misunderstanding or confusion is not grounds for review. See ***United States v. Arditti,*** 955 F.2d 331, 342 (5th Cir. 1992) (" . . . the affidavits of juror confusion are not relevant for our decision, as whether a jury misunderstands its instructions is not to be re-examined after the verdict.").

Here the juror's purported statements are classic examples of jury deliberations that are totally devoid of any representations of extrinsic or outside influences. As such, Rule 606(b)[1] prohibits a juror from testifying about the deliberative process:

> . . . the rule separately bars juror testimony regarding at least four topics: (1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberation, and (4) the

[1] Rule 606(b) states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence or any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

> testifying juror's own mental process during the deliberations.

United States v. Ortiz, 942 F.2d 903, 913 (5th Cir. 1991), *cert. denied,* 504 U.S. 985, See also, ***United States v. Ruggiero,*** 56 F.3d 647, 652 (5th Cir. 1995), and cases cited therein. Here the juror's statements clearly relate to each of the four prohibited topics set out above. See also ***Tanner v. United States,*** 483 U.S. 107 (1987).

Contrary to Defendant's allegations, the juror's statements do not concern exposure to any extrinsic evidence. Extrinsic information under Rule 606(b) is "when the jury obtains or uses evidence that has not been introduced during trial if there is 'a reasonable possibility that the extrinsic material could have affected the verdict.' " ***United States v. Hernandez-Escarsega,*** 886 F.2d 1560, 1561 (9th Cir. 1989). Here, the concerns expressed relate to the Court's instructions and the application of those instructions. "Rule 606(b) has consistently been used to bar testimony when the jury misunderstood instructions." ***United States v. Wickersham,*** 29 F.3d 191, 194 (5th Cir. 1994), and cases cited therein.

II. THE COURT'S CHARGE WAS CORRECT

The Defendant contends, in part based on the alleged statements of one juror, that the Court erred by not giving his requested jury instruction No. 5. This instruction includes the following:

> [If the jury did not unanimously agree on the death penalty] the jury **must** fix his punishment at life in prison without any possibility of release.

Again, unless all twelve members of the jury determine that Mr. Jones should receive the death penalty, **I will impose a sentence of life imprisonment without possibility of release.** In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and **I will impose a sentence of life imprisonment without possibility of release.**

In the event you are unable to agree on Life Without Possibility of Release or Death, but you are unanimous that sentence should be not less than Life Without Possibility of Release, you should report that vote to the Court and the Court will sentence the defendant to Life Without the Possibility of Release". (emphasis added)

The Court properly refused this instruction as it is confusing and not a correct statement of the law. On appeal, a case can be reversed for a district court's refusal to give a requested jury instruction only if the requested instruction was substantially correct. ***United States v. Laury,*** 49 F.3d 145, 152 (5th Cir. 1995); ***United States v. Tomblin,*** 46 F.3d 1369 (5th Cir. 1995). The trial judge has substantial latitude in formulating the jury charge, and the court's refusal to give a requested instruction is reviewed only for an abuse of discretion. ***Laury,*** 49 F.3d at 152.

It is very questionable that there was any misunderstanding or confusion concerning the instructions that were given. The Defendant is incorrect when alleging that a hung jury as to the death penalty would result in the Court's imposing a sentence of life imprisonment without

possibility of release. Under 18 U.S.C. 3593(e) and 3594, the jury's recommendation for death or life without possibility of release must be unanimous in order for mandatory imposition of either of those sentences. If the jury could not agree unanimously on either death or life without possibility of release, then the Court could impose a sentence of either life imprisonment with or without possibility of release. In this respect then, the jury was not confused nor did they misunderstand the instructions as alleged.

* * *

WHEREFORE, PREMISES CONSIDERED, for the foregoing reasons it is respectfully submitted that Defendant JONES' Motion for New Trial should be denied.

Respectfully submitted,

PAUL E. COGGINS
UNITED STATES ATTORNEY

/s/ Tanya K. Pierce
TANYA K. PIERCE
ASSISTANT UNITED STATES ATTORNEY
State Bar No. 15103300
1205 Texas Avenue, Room 207
Lubbock, Texas 79401
806/743-7351

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	)	
	)	NO. 5:95-CR-0047-C
v.	)	
LOUIS JONES	)	

ORDER

(Filed Jan. 29, 1996)

The Court has considered Defendant's Motion for New Trial and the Government's Response thereto. For the reasons set forth in the Government's Response, the Court **DENIES** the Defendant's Motion for New Trial.

SO ORDERED.

Dated this 29th day of January, 1996.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal No.
vs.	)	5-95-CR-0047-C
LOUIS JONES,	)	
	)	
Defendant.	)	

MOTION TO RECONSIDER ORDER DENYING MOTION FOR NEW TRIAL

(Filed Jan. 30, 1996)

The Defendant, by counsel, pursuant to the Fifth, Sixth and Eighth Amendments to the United States Constitution, Rule 33 of the Rules of Criminal Procedure, and the provisions of 18 U.S.C. 3591 *et seq.*, moves the court to reconsider the order denying the defendant's Motion for Trial entered on January 29, 1996 and grant a New Trial in the above styled cause.

In support of his motion, defendant states as follows:

The defendant was assessed a sentence of death on November 3, 1995. A Motion for New Trial was filed on January 3, 1996, and the Court signed an order denying same on January 29, 1996.

In response the to [sic] claims presented regarding jury misconduct and the Court's Charge, the government has taken the position that at most, a misunderstanding of the Court's instructions occurred, and that in any event, the Court's charge was correct.

As a matter of constitutional law under the 8th Amendment and the statutory construction of the Federal Death Penalty Act of 1994, a jury hung between Life without Possibility of Release and a sentence of Death but whose members unanimously reject the option of a lesser sentence, has in effect, reached a decision against the imposition of the death penalty. That is exactly what happened in this case. Juror Cassandra Hastings contacted counsel after the filing of the Motion for New Trial and has submitted an affidavit attached hereto as Exhibit A. This affidavit demonstrates that the jury was in fact exposed to extrinsic evidence in that a juror expressed a misstatement of the law, asserted as fact, by one professing to know the law, which statement was relied on by other jurors, who for that reason changed their vote to a harsher punishment. As detailed by the juror, another specific juror reported incorrect extraneous information regarding the state of the law, informing the jury that if the jury was hung the court would in fact impose a lesser sentence that could result in the defendant being released from prison.

The jury thus sentenced the defendant to death based on the erroneous belief that failure to agree on a verdict could result in the imposition of a "lesser sentence" that would result in the defendant's release from prison. The Government concedes that the Court could only impose a sentence of "either life imprisonment with or without possibility of release." A life sentence under current federal law is without parole. Therefore, the defendant was harmed by unwarranted speculation regarding his possible release. The defendant's requested charge, if given by the Court, would have clarified this issue for the jury.

Based on the accounts of deliberations, it appears that the absence of instructions on this issue contributed significantly to the imposition of the death penalty.

Conclusion

The sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factor.

WHEREFORE, the defendant prays:

(a) That the reconsider the order denying a New Trial and grant a New Trial in this cause and set aside the sentence of death; and

(b) Grant an evidentiary hearing to resolve the issues set forth herein; and

(c) Such other relief as may be appropriate.

Respectfully submitted,

/s/ Carlton McLarty
Carlton McLarty
Assistant Federal
Public Defender
TBA #13740400
1205 Texas Avenue
Lubbock, Texas 79401
806-743-7236

/s/ Daniel Hurley by Carlton McLarty
Daniel W. Hurley
Hurley and Sowder
TBA #10310200
1703 Avenue K
Lubbock, Texas 79401
806-763-0409

"Ex. A"

STATE OF TEXAS *
* AFFIDAVIT
COUNTY OF LUBBOCK *

BEFORE ME, the undersigned authority, on this day personally appeared CASSANDRA HASTING, a credible person, of legal age, who, after being duly sworn by me on her oath states the following:

My name is Cassandra Hastings. I served as a juror in the trial of United States v. Louis Jones.

I have contacted the office of Dan Hurley, Attorney, in order to inform him of matters relating to the deliberations in the trial of Mr. Jones. I contacted Mr. Hurley's office after I heard news accounts of another jurors' statements about our deliberations. I discussed the case with Mr. Hurley, then I called him back again, and then I visited him at his office. This affidavit was prepared in his office and I have carefully reviewed it for accuracy.

During the course of our deliberations we were confused as to the meaning of the courts instructions. Initially, no one knew exactly what would happen if we were unable to reach a verdict. This issue came up on the first day of deliberations.

Once we reached the point in our deliberations where we discussing the punishment our initial vote was 8 to 4 for the death penalty. I was one of the jurors who did not want to impose a death sentence, but instead I favored Life without possibility of release. Many of the other jurors were willing to impose a Life without release

sentence. In fact, it is my recollection that all but three jurors were willing to vote to impose Life without release. However, the other three jurors were firm in their opposition to Life without release. It looked like we might have had a hung jury. At this point we again discussed the effect of a hung jury.

One of the men, I believe it was Mr. Carthel from Plainview, said that if we had a hung jury then the sentence would be left up to the judge and that Louis Jones would get the lesser sentence referred to in the last jury verdict form. People then brought up the possibility that Mr. Jones could be released from prison. No one wanted this to happen or even be possible.

I feel that a great deal of pressure was brought to bear on me to get me to change my vote. This pressure included the information that the judge would impose a lesser sentence than Life without release if we didn't reach a verdict.

I would not have changed my vote to a death sentence if I had known that a hung jury would not result in the defendant being released form prison at a later. I do not feel that the death sentence is the appropriate sentence in this case and I changed my vote because of the intense pressure from other jurors and the information that Mr. Jones would get a sentence that would result in his release from prison if we had a hung jury.

/s/ Cassandra Hastings
CASSANDRA HASTINGS

SUBSCRIBED AND SWORN TO before me by the said CASSANDRA HASTINGS on this the 19th day of January, 1996 to certify which witness my hand and seal of office.

/s/ Annabel Padilla
Notary Public,
Lubbock County, Texas

[SEAL] ANNABEL PADILLA
Notary Public, State of Texas
My Commission Expires 9-14-98

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	)	NO. 5-95-CR-0047-C
v.	)	
LOUIS JONES	)	

ORDER

(Filed Jan. 30, 1996)

The Court having considered Defendant's Motion to Reconsider Order Denying Motion for New Trial, filed January 30, 1996, is of the opinion that the same should be **DENIED.**

SO ORDERED.

Dated This 30th day of January, 1996.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States
District Judge

REVISED, February 10, 1998

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-10113 and No. 96-10448

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LOUIS JONES, JR.,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Texas

January 5, 1998

Before POLITZ, Chief Judge, and BENAVIDES and PARKER, Circuit Judges. Robert M. Parker, Circuit Judge:

The defendant, Louis Jones, appeals from a conviction of kidnapping with death resulting, in violation of 18 U.S.C. § 1201. After a post-conviction sentencing hearing, the jury recommended the death penalty. The defendant challenges the sentence of death imposed by the court pursuant to the Federal Death Penalty Act of 1994 ("FDPA"), 18 U.S.C. §§ 3591-97. After considering all the issues raised by the defendant on appeal, we affirm both the conviction and the sentence of death.

I. Background

On February 18, 1995, Pvt. Tracie Joy McBride was abducted at gunpoint from Goodfellow Air Force Base. During the abduction, Pvt. Michael Peacock was assaulted by McBride's attacker and severely injured while attempting to aid McBride. The base launched an intense investigation into the abduction of McBride.

On March 1, 1995, Sgt. Sandra Lane informed investigators of the Office of the Air Force Special Investigations ("OSI"), who were investigating the abduction of Pvt. McBride, that her ex-husband, Louis Jones, had attacked her on February 16, 1995, two days before McBride's disappearance. After convincing Lane to file a complaint, the OSI investigators summoned San Angelo Police who took a sworn statement from Lane. An arrest warrant was issued for Jones based on the statement made by Lane. Jones was arrested later that evening.

While in state custody for the abduction and sexual assault of Sandra Lane, investigators from the OSI questioned Jones as a possible suspect in the abduction of Pvt. McBride. The OSI investigators advised Jones of his Miranda rights, but Jones indicated that he did not want an attorney and that he was willing to answer questions. In response to questioning by OSI investigators, Jones gave a written statement admitting to the abduction and murder of McBride. In his statement, Jones admitted to taking McBride back to his apartment, tying her up, and placing her in the closet. Jones stated that he then drove McBride to a remote location where he repeatedly struck her over the head with a tire iron until she was dead. Although Jones could not give investigators directions to where the

body was located, he indicated that he could show them. Subsequently, Jones lead law enforcement officials to a bridge located twenty miles outside San Angelo under which the body of Tracie McBride was discovered. An autopsy revealed that McBride died due to blunt force trauma to the head. The autopsy also revealed evidence of sexual assault.

Louis Jones was indicted in an instrument that charged him with kidnapping McBride with her death resulting, in violation of 18 U.S.C. § 1201(a)(2). The government alleged that the offense occurred within the special maritime and territorial jurisdiction of the United States. Conviction for kidnapping with death resulting under the Federal Kidnapping Statute, 18 U.S.C. § 1201, could result in a sentence of life imprisonment or death. Exercising the discretion granted by the Federal Death Penalty Act, the United States Attorney prosecuting the case decided to seek the death penalty. As required by 18 U.S.C. § 3593(a), the prosecution filed its Notice of Intent to Seek the Death Penalty. The jury trial commenced on October 16, 1995 and resulted in a guilty verdict on October 23, 1995.

Following Jones's conviction, a separate sentencing hearing was conducted to determine whether Jones would receive a sentence of death. *See* 18 U.S.C. § 3593. To obtain a sentence of death, the government had the burden of proving the following: the death of McBride was an intentional killing; and the existence of one or more aggravating factors make the defendant death-eligible. 18 U.S.C. § 3591(a). In the first stage of the sentencing hearing, the jury was required to determine whether Louis Jones intentionally caused the death of Tracie

McBride. 18 U.S.C. § 3591(a). Regarding the intent element, the jury unanimously found: (1) Jones intentionally killed McBride; and (2) Jones intentionally inflicted seriously bodily injury that resulted in the death of McBride.

The second stage of the sentencing hearing required the jury to weigh any aggravating factors against any mitigating factors to determine whether a sentence of death was appropriate. 18 U.S.C. § 3593(e). The government, in its notice of intent to seek the death penalty, set forth four statutory aggravating factors[1] and three non-statutory aggravating factors.[2] In order to consider an

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[1] The government alleged the following four statutory aggravating factors:

> (1) the defendant caused the death or injury resulting in the death of Tracie Joy McBride during the commission of the offense of kidnapping;
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> (2) the defendant, in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense, Tracie Joy McBride;
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> (3) the defendant committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture and serious physical abuse to the victim, Tracie Joy McBride; and
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> (4) the defendant committed the offense after substantial planning and premeditation to cause the death of Tracie Joy McBride.

[2] The three non-statutory aggravating factors are as follows:

(1) the defendant's future dangerousness to the lives and safety of other persons;

aggravating factor, the jury must unanimously find that the government established the existence of an aggravating factor beyond a reasonable doubt. 18 U.S.C. § 3593(c). The jury made unanimous findings regarding the following two statutory factors: Jones caused the death of the victim or the injury resulting in the death of the victim during the commission of the offense of kidnapping; and Jones committed the offense in an especially heinous, cruel, and depraved manner. The jury also made unanimous findings regarding the following two non-statutory aggravating factors: McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas; and McBride's personal characteristics and the effect of the offense on her family.

Once the jury found aggravating factors to exist, the jury next had to determine whether any mitigating factors existed. To consider a mitigating factor in jury deliberations, only one juror must find that the defendant established the existence of a mitigating factor by a preponderance of the evidence. Of the eleven mitigating factors proposed by the defendant, ten mitigating factors were found to exist by at least one or more jurors.[3] In

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(2) Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas; and

(3) Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family.

[3] The defendant proposed eleven mitigating factors, ten of which were found to exist by one or more jurors (the number of jurors finding each mitigating factor is enclosed in brackets):

deliberations, the jury was asked to weigh the aggravating factors against any mitigating factors to determine

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(1) the defendant Louis Jones did not have a significant prior criminal record [6];

(2) the defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform to the requirements of the law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge [2];

(3) the defendant committed the offense under severe mental or emotional disturbance [1];

(4) the defendant was subjected to physical, sexual, and emotional abuse as a child (and was deprived of sufficient parental protection that he needed) [4];

(5) the defendant served his country well in Desert Storm, Grenada, and for 22 years in the United States Army [8];

(6) the defendant is likely to be a well-behaved inmate [3];

(7) the defendant is remorseful for the crime he committed [4];

(8) the defendant's daughter will be harmed by the emotional trauma of her father's execution [9];

(9) the defendant was under unusual and substantial internally generated duress and stress at the time of the offense [3];

(10) the defendant suffered from numerous neurological or psychological disorders at the time of the offense [1]; and

(11) other factors in the defendant's background or character militate against the death penalty [0].

Additionally, seven jurors added Jone's ex-wife Sandra Lane as a mitigating factor.

the propriety of a death sentence. The jury returned a unanimous verdict recommending death on November 3, 1995.

II. Constitutionality of Federal Death Penalty Act

The defendant challenges the constitutionality of the Federal Death Penalty Act, 18 U.S.C. §§ 3591-97, on the following four grounds: (1) the prosecutor's ability to define non-statutory aggravating factors amounts to an unconstitutional delegation of legislative power; (2) the lack of proportionality review combined with prosecutor's unrestrained authority to allege non-statutory aggravating factors renders the statute unconstitutional; (3) the relaxed evidentiary standard at the sentencing hearing combined with the unrestrained use of non-statutory aggravating factors renders the jury's recommendation arbitrary; and (4) the death penalty is unconstitutional under all circumstances. We review constitutional challenges to federal statutes de novo. *United States v. Bailey*, 115 F.3d 1222, 1225 (5th Cir. 1997).

A.

First, the defendant asserts that the prosecutor's authority to define non-statutory aggravating factors results from an unconstitutional delegation of legislative power. The nondelegation doctrine arises from the constitutional principle of separation of powers, specifically Article 1, § 1, which provides that "all legislative Powers herein granted shall be vested in a Congress of the United States." *See Touby v. United States*, 500 U.S. 160, 165 (1991);

United States v. Mistretta, 488 U.S. 361, 371 (1989). Under the nondelegation doctrine, Congress may not constitutionally delegate its legislative power to another branch of government. *See Mistretta*, 488 U.S. at 372. Congress, however, may seek assistance, within limits, from coordinate branches of government. *See id.* So long as Congress formulates "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.*

Jones asserts that Congress failed to formulate an "intelligible principle" in § 3592(c) when it delegated the authority to define additional aggravating factors to the Department of Justice.[4] On the contrary, the delegated authority is sufficiently circumscribed by "intelligible principles" to avoid violating the nondelegation doctrine. *See United States v. Tipton*, 90 F.3d 861, 895 (4th Cir. 1996). The authority to define nonstatutory aggravating factors falls squarely within the Executive's broad prosecutorial discretion, much like the power to decide whether to prosecute an individual for a particular crime. *See United States v. Armstrong*, ___ U.S. ___, 116 S.Ct. 1480, 1486 (1996)(noting the prosecutor's broad discretion in deciding whether to prosecute); *United States v. Johnson*, 91 F.3d 695, 698 (5th Cir. 1996) (stating that "[a] prosecutor has broad discretion during pretrial proceedings to determine

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[4] In reviewing similar challenges to the death penalty provisions of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e), two other circuits rejected this argument. *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1966); *United States v. Tipton*, 90 F.3d 861, 895 (4th Cir. 1996).

the extent of the societal interest in prosecution.") Obviously, Congress could not list every possible aggravating factor. An exclusive list of factors would bind the hands of the prosecutor in deciding whether to pursue the death penalty.

Nevertheless, the prosecution does not have *carte blanche* in devising non-statutory aggravating factors. At least four limitations guide the prosecution in exercising its delegated authority. First, the statute limits the scope of aggravating factors to those for which prior notice has been given by the prosecution.[5] *See* 18 U.S.C. § 3593(a). Second, the death penalty jurisprudence devised by the Supreme Court guides the prosecution in formulating nonstatutory aggravating factors. For example, due process requires that information submitted as aggravating genuinely narrow the class of persons eligible for the death penalty. *See Zant v. Stephens*, 462 U.S. 862, 877 (1983). Third, the district court functions as a gatekeeper to limit the admission of useless and impermissibly prejudicial information. *See* 18 U.S.C. § 3593(c). And fourth, the requirement that the jury find at least one statutory aggravating factor beyond a reasonable doubt before it may consider the non-statutory factors further limits the delegated authority. *See* 18 U.S.C. § 3593(d). The requirement of at least one statutory aggravating factor secures sufficient Congressional guidance in classifying death-

[5] Section 3592(c) allows the jury to consider "whether any other aggravating factor for which notice has been given exists." 18 U.S.C. § 3592(c).

eligible offenders. Consequently, these limitations provide the prosecution with an "intelligible principle" so that an unconstitutional delegation does not occur.

B.

Second, the defendant argues the lack of proportionality review combined with the prosecutor's unrestrained authority to allege non-statutory aggravating factors renders the statute unconstitutional. Proportionality review examines the appropriateness of a sentence for a particular crime by comparing the gravity of the offense and the severity of the penalty with sentencing practices in other prosecutions for similar offenses. *See Pulley v. Harris*, 465 U.S. 37, 43 (1984). Although the Court has upheld capital sentencing schemes requiring proportionality review, the Court has never required such review as constitutionally mandated. *See Gregg v. Georgia*, 428 U.S. 153, 204-05 (1976) (plurality opinion) (noting the benefits of proportionality review as a means of preventing arbitrary death sentences, but not mandating such review). *See also Pulley*, 465 U.S. at 44-45 ("that some [capital sentencing] schemes providing proportionality review are constitutional does not mean that such review is indispensable"). Thus, the Constitution does not require comparative proportionality review in every capital case, but only that the death penalty not be imposed arbitrarily or capriciously. *See Pulley*, 465 at 49-50.

The FDPA is not so lacking in other checks on arbitrariness that it fails to pass constitutional muster for lack of proportionality review. *See id.* at 880. The FDPA bifurcates the penalty phase from guilt determination. During

the penalty phase, the jury must first determine whether the defendant intentionally killed the victim, or intentionally committed or participated in an act that resulted in the death of the victim. 18 U.S.C. § 3591(a). Then the jury must make a finding, beyond a reasonable doubt, of the existence of any aggravating factor or factors enumerated in § 3592(c). After finding the existence of at least one statutory aggravating factor, the jury may consider the existence of nonstatutory aggravating factors for which notice has been given by the government. *See* 18 U.S.C. § 3593(d). Individual jurors must then consider evidence of any mitigating factor that he or she has found to exist by a preponderance of the evidence. Prior to imposing a sentence of death, the jurors must conclude that evidence of the aggravating factors unanimously found to exist beyond a reasonable doubt, both statutory and nonstatutory, outweighs the mitigating factors any individual juror has found to exist by a preponderance of the evidence. Additionally, the statute provides for appellate review to determine whether the death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor. 18 U.S.C. § 3595.

Jones argues that the Constitution requires proportionality review when the capital sentencing procedure allows the jury to consider nonstatutory aggravating factors because of the danger that the death penalty will be imposed arbitrarily, capriciously, or freakishly. As long as the statute prevents an arbitrary death sentence, the inclusion of relevant nonstatutory aggravating factors at the sentencing stage does not render the death penalty scheme unconstitutional. *See Barclay v. Florida*, 463 U.S. 939, 957 (1983) (citing *Zant v. Stephens*, 462 U.S. 862,

878-89 (1983)). The FDPA provides sufficient safeguards to prevent the arbitrary imposition of the death penalty. First, the legislature designed a narrow statute by applying the death penalty to a limited number of criminal offenses.[6] *See* 18 U.S.C. § 3591. Second, the statute further narrows the class of persons eligible for the death penalty by requiring a finding of at least one statutory aggravating factor. *See* 18 U.S.C. § 3593(d). And third, the statute provides for appellate review to determine whether the evidence supports the special finding of an aggravating factor and to ensure that the death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. *See* 18 U.S.C. § 3595. Consequently, we hold that the Constitution does not mandate proportionality review when the capital sentencing scheme permits the jury to consider nonstatutory aggravating factors as long as the statute provides for other safeguards against an arbitrary imposition of the death penalty.

C.

Third, Jones argues that the relaxed evidentiary standard at the sentencing hearing combined with the unrestrained use of non-statutory aggravating factors renders the jury's recommendation arbitrary and unreliable. The Federal Death Penalty Act provides for a relaxed evidentiary standard during the sentencing hearing in order to

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[6] A defendant may be sentenced to death if convicted of the following offenses: espionage, 18 U.S.C. § 794; treason, 18 U.S.C. § 2381; or intentionally murdering or causing the death of a person during the commission of certain crimes, see, e.g., kidnapping with death resulting, 18 U.S.C. § 1201.

give the jury an opportunity to hear all relevant and reliable information, unrestrained by the Federal Rules of Evidence. The FDPA provides:

> The government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a). Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death.

18 U.S.C. § 3593(c). Therefore, the defendant and the government may introduce any relevant information during the sentencing hearing limited by the caveat that such information be relevant, reliable, and its probative value must outweigh the danger of unfair prejudice.[7]

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[7] The relevancy standard enunciated in § 3593(c) actually excludes a greater amount of prejudicial information than the Federal Rules of Evidence because it permits the judge to exclude information where the "probative value is outweighed by the danger of creating unfair prejudice" rather than "substantially outweighed." *See* Fed. R. Evid. 403. *See also* Anti-Drug Abuse Act, 21 U.S.C. § 848(j) (codifying Fed. R. Evid. 403 standard of "substantially outweighs").

Although the Eighth Amendment requires a heightened reliability standard in capital sentencing proceedings, the jury must also receive sufficient information regarding the defendant and the offense in order to make an individual sentencing determination. *See Lowenfield v. Phelps*, 484 U.S. 231, 238-239 (1988) (the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"). The Court has recognized that the defendant must be given the opportunity to introduce information regarding mitigating factors, without traditional evidentiary restraints, in order to provide the jury with the fullest possible information about the defendant. *See Gregg v. Georgia*, 428 U.S. 153, 204 (1976) ("So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."). *See also Jurek v. Texas*, 428 U.S. 262, 276 (1976) (stating that it is "essential . . . that the jury have before it all possible relevant information about the individual defendant whose fate it must determine"). Although the sentencing hearing will not be governed by traditional evidentiary restraints, the district court will prevent the evidentiary free-for-all prophesied by Jones by excluding unfairly prejudicial information under the standard enunciated in § 3593(c). Consequently, the relaxed evidentiary standard does not impair the reliability or relevance of information at capital sentencing hearings, but helps to accomplish the individualized sentencing required by the constitution. *See*

United States v. Nguyen, 928 F.Supp. 1525, 1546-47 (D.Kan. 1996).

D.

Finally, the defendant argues that the death penalty is unconstitutional under all circumstances. We are bound by Supreme Court precedent which forecloses any argument that the death penalty violates the Constitution under all circumstance. *See McCleskey v. Kemp*, 481 U.S. 279, 300-03 (1987); *Gregg v. Georgia*, 428 U.S. 153 (1976).

III. Jury Instructions

A.

The defendant claims that the district court erred by failing to give the defendant's requested instructions. We review the district court's refusal to give a requested instruction for abuse of discretion. *See United States v. Townsend*, 31 F.3d 262, 270 (5th Cir. 1994). A refusal to give a requested instruction is reversible error only if the proposed instruction was (1) substantively correct, (2) not substantively covered in the jury charge, and (3) concerned an important issue in the trial, such that failure to give the requested instruction seriously impaired the presentation of a defense. *Id.*

The actual jury instructions given by the district court repeated the sentencing options available under the FDPA. The instructions traced 18 U.S.C. § 3593(e) by informing the jury that it could recommend death, life without the possibility of release, or some lesser sentence. The defendant, however, contends that the jury should

have been instructed that a failure to reach a unanimous verdict recommending the death penalty would result in the court automatically imposing a sentence of life without the possibility of release.[8] The defendant's proposed instructions were not substantively correct because the proposed instructions informed the jury that the failure to return a unanimous verdict would result in an automatic sentence of life without the possibility of release. Such is not the case under § 3593, which requires unanimity for every sentence rendered by the jury regardless of whether the verdict is death, life without the possibility of release, or, if possible under the substantive criminal statute, any other lesser sentence. Life without the possibility of release was not the default penalty in the event of non-unanimity. On the contrary, the failure to reach a unanimous decision regarding sentencing would result in a hung jury with no verdict rendered. As such, a second

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[8] The defense proposed two jury instructions regarding the unanimity requirement. Requested instruction number five, entitled "Unanimity Required Only for Death Sentence," provided in relevant part as follows:

> In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release.

The defense's requested jury instruction number four provided in relevant part as follows:

> If, after fair and impartial consideration of all the evidence in this case, any one of you is not persuaded that justice demands Mr. Jones's execution, then the jury must return a decision against capital punishment and must fix Mr. Jones's punishment at life in prison without the possibility of release.

sentencing hearing would have to be held in front of a second jury impaneled for that purpose. *See* 18 U.S.C. § 3593(b)(2)(C). Therefore, the district court did not err by refusing to give the defendant's requested instructions because such instructions were not substantively correct.

B.

Additionally, the defendant contends that the district court committed reversible error with the instructions actually given for the following two reasons: First, Jones argues that the instructions actually given by the district court caused the jurors to recommend the death penalty under the false impression that the failure to reach a unanimous verdict would automatically result in the imposition of some lesser sentence. Second, Jones argues that the instructions incorrectly informed the jury they had the option of recommending some lesser sentence, in addition to the death penalty or life imprisonment options. Thus, the defendant claims that the instruction resulted in an arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment and Due Process.

We review all alleged errors in jury instructions for abuse of discretion. *United States v. Townsend*, 31 F.3d 262, 270 (5th Cir. 1994). A conviction will not be reversed unless the jury instructions, when viewed in their entirety, failed to correctly state the law. *See United States v. Flores*, 63 F.3d 1342, 1374 (5th Cir. 1995). Thus, even if a portion of the jury instructions are not technically perfect, the district court's instructions will be affirmed on appeal if the charge in its entirety presents the jury with a

reasonably accurate picture of the law. *See id.* (citing *United States v. Branch*, 46 F.3d 440, 442 n. 2 (5th Cir. 1995)). The district court will be reversed, however, if the interpretation urged by the appellant is one that a "reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form[s] employed in this case." *Id.* at 175 (citing *Mills v. Maryland*, 486 U.S. 367, 375-76 (1988)).

If the defendant did not object below, we review for plain error. *See Flores*, 63 F.3d at 1374 (citing *United States v. Willis*, 38 F.3d 170, 179 (5th Cir. 1994)). Under the plain error standard, there must be an error that is plain and that affects substantial rights. *See* Fed. R. Crim. P. 52(b). *See also United States v. Olano*, 507 U.S. 725, 731 (1993) (explaining plain error standard). Thus, an appellate court may correct a plain error only if it meets the following criteria: (1) there must be an error, which is defined as a deviation from a legal rule in the absence of a valid waiver; (2) the error must be clear or obvious error under current law; and (3) the error must have been prejudicial or affected the outcome of the district court proceedings. *See Olano*, 507 U.S. at 732-35; *United States v. Dupre*, 117 F.3d 810, 816 (5th Cir. 1997); *United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc). Additionally, an appellate court has discretion in deciding whether to correct a plain error. *See Olano*, 507 U.S. at 735-36. Such discretion should not be exercised unless the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (citing *United States v. Young*, 470 U.S. 1, 15 (1985)).

The district court instructed the jury as follows:

> After you have completed your findings as to the existence or absence of any aggravating or mitigating factors, you will then engage in a weighing process. In determining whether a sentence of death is appropriate, you must weigh any aggravating factors that you unanimously find to exist – whether statutory or non-statutory – against any mitigating factors that any of you find to exist. You shall consider whether all the aggravating factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. *Based upon this consideration, you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence.*
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> If you unanimously conclude that the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of any mitigating factors, the aggravating factors are themselves sufficient to justify a sentence of death, you may recommend a sentence of death. Keep in mind, however, that regardless of your findings with respect to aggravating and mitigating factors, you are never required to recommend a death sentence.
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> If you recommend the imposition of a death sentence, the court is required to impose that sentence. If you recommend a sentence of life without the possibility of release, the court is required to impose that sentence. If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended.
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> . . . .
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> In order to bring back a verdict recommending the punishment of death or life without the possibility of release, all twelve of you must unanimously vote in favor of such specific penalty.

i.

We must first decide whether the instructions given by the district court could have led a reasonable jury to believe that the court would automatically impose some lesser sentence if the jury failed to reach a unanimous verdict, as alleged by the defendant. As we have previously stated, § 3593(e) requires the jury to return a unanimous verdict regardless of whether the jury recommends death, life without the possibility of release, or some other lesser sentence. In arguing that the jury instructions and verdict forms caused the jury confusion, the defendant points to the following: (1) the district court did not repeat the unanimity requirement each time the court

mentioned the lesser sentence option in the instruction; (2) decision forms B and C, which recommended the death sentence and life imprisonment without the possibility of release, required the signature of all twelve jurors, while decision form D which recommended a lesser sentence only required the signature of the foreman; (3) the court erred by declining to instruct the jury on the effect of the failure to arrive at a unanimous decision; and (4) after the sentencing hearing, two jurors gave statements to defense attorneys attesting to the confusion caused by the jury instructions.

Regarding the district court's failure to repeat the unanimity requirement each time the court mentioned the lesser sentence option, the instructions could not have led a reasonable jury to conclude that non-unanimity would result in the imposition of a lesser sentence. *See Flores*, 63 F.3d at 1375. Reading the instructions in their entirety, the court clearly stated that the jury must reach a unanimous verdict. At no time were the jurors ever informed that the failure to reach a unanimous verdict would result in the imposition of a term less than life imprisonment. As such, we hold that the district court did not abuse its discretion by failing to repeat the unanimity requirement.

Additionally, the defendant argues that the disparity of the verdict forms caused the jury to assume that non-unanimity would result in a lesser sentence because form D only required the signature of the jury foreperson, when forms B and C required all twelve juror signatures. The defendant did not object to the format of the verdict forms; therefore, we review for plain error. *See Flores*, 63 F.3d at 1374. Although the verdict forms standing alone could have persuaded a jury to conclude that unanimity

was not required for the lesser sentence option, any confusion created by the verdict forms was clarified when considered in light of the entire jury instruction. Consequently, we hold that no error occurred.

Next, Jones argues that the failure to instruct the jury of the consequences of not reaching a unanimous verdict resulted in a violation of the Eight [sic] Amendment proscription against cruel, unusual, and excessive punishment. Jones requested, but was denied, an instruction on the failure to arrive at a unanimous decision. Jones points to *State v. Williams*, 392 So.2d 619 (La. 1980), where the Louisiana Supreme Court held that juries must be informed of the consequences of failing to achieve a unanimous verdict. The defendant does not persuade us by invoking *Williams* because the Louisiana death penalty act, under which Williams was sentenced, expressly provided that life imprisonment resulted when the jury could not unanimously agree on the death penalty. Unlike the Louisiana statute, the Federal Death Penalty Act requires the jury to achieve unanimity or no verdict results. *See* 18 U.S.C. § 3593(e). Although the use of instructions to inform the jury of the consequences of a hung jury have been affirmed, federal courts have never been affirmatively required to give such instructions. *See Allen v. United States*, 164 U.S. 492, 501-02 (1896) (upholding the use of supplemental instructions to inform the jury of the effect of a hung jury); *United States v. Sutherland*, 463 F.2d 641, 648 (5th Cir. 1972) (allowing use of *Allen* charge). Consequently, we hold that no constitutional violation occurs when a district court refuses to inform the jury of the consequences of failing to reach a unanimous verdict.

Finally, the defendant attempts to prove the instructions caused jury confusion through the use of juror affidavits. Following the sentencing hearing, two jurors initiated communications with defense attorneys in which the jurors referred to alleged confusion caused by the instructions regarding the unanimity requirement.[9] Jones cannot utilize juror affidavits to undermine the jury verdict. *See* Fed. R. Evid. 606(b); *United States v. Ruggiero*, 56 F.3d 647, 652 (5th Cir. 1995). Federal Rule of Evidence 606(b) bars juror testimony regarding at least four topics: (1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberations, and (4) the testifying juror's own mental process during the deliberations. *See Ruggiero*, 56 F.3d at 652. Under the rule, a juror may only testify to extraneous forces which influence jury deliberations. *See Tanner v. United States*, 483 U.S. 107, 121 (1987) (juror use of alcohol and drugs not extraneous influence on jury deliberations). Allegations of jury confusion caused by jury instructions would not be an outside influence about

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[9] Juror Christie Beauregard called the office of the Federal Public Defender and spoke with attorney Carlton McLarty and investigator Daniel Salazar. Mr. Salazar executed an affidavit detailing the conversation he had with Ms. Beauregard in which she stated that she was pressured into changing her vote by other jurors who believed that the court would impose a lesser sentence if the jury did not reach a unanimous verdict.

Juror Cassandra Hastings contacted defense attorney Daniel Hurley. Ms. Hastings executed an affidavit stating that she changed her vote to death under the mistaken belief that if the jury could not reach a unanimous decision, then the court would impose a lesser sentence.

which a juror could competently testify. *See Peveto v. Sears Roebuck & Co.*, 807 F.2d 486, 489 (5th Cir. 1987). An "outside influence" refers to a factor originating outside of normal courtroom proceedings which influences jury deliberations, such as a statement made by a bailiff to the jury or a threat against a juror. *Id.* (citing Fed. R. Evid. 606(b) Advisory Committee Note and Judiciary Committee Note). Rule 606(b) has consistently been used to bar testimony when the jury misunderstood instructions. *See, e.g., Robles v. Exxon Corp.*, 862 F.2d 1201, 1204 (5th Cir. 1989) (holding that juror testimony regarding misunderstanding of instructions prohibited by rule 606(b)). The defendant argues that the inapplicability of the Federal Rules of Evidence during sentencing hearings precludes the use of Rule 606(b) to bar juror affidavits impeaching the sentence. *See* 18 U.S.C. § 3593(c). The reasons for not allowing jurors to undermine verdicts in jury trials, however, apply with equal force to sentencing hearings. *See Silagy v. Peters*, 905 F.2d 986, 1009 (7th Cir. 1990) (holding that a juror's statements could not be used in a habeas corpus proceeding to impeach the jury's sentencing determination). Noting that the Eighth Amendment requires a "greater degree of reliability when the death sentence is imposed," we are convinced that Rule 606(b) does not harm but helps guarantee the reliability of jury determinations in death penalty cases. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (stating that the qualitative difference with the death penalty requires a greater degree of reliability).

Jury deliberations entail delicate negotiations where majority jurors try to sway dissenting jurors in order to reach certain verdicts or sentences. An individual juror

no longer exposed to the dynamic offered by jury deliberations often may question his vote once the jury has been dismissed. Such self-doubt would be expected once extrinsic influences bear down on the former jurors, especially in decisions of life and death. When polled, each juror affirmatively indicated that he had voted for the death penalty. We will not allow a juror to change his mind after the jury has rendered a verdict. In this situation, the outcome could just as easily have turned out the other way with the jurors not supporting the death sentence convincing the death-prone jurors to impose life without the possibility of release. If the jury truly feared that the district court would impose some lesser sentence in the absence of a unanimous recommendation, then the jury had the option of imposing life without the possibility of release. Furthermore, the jury never sought a clarifying instruction to remedy the alleged confusion. Consequently, the affidavits do not convince us that the instructions given by the district court could lead a reasonable jury to believe that the failure to reach a unanimous decision would result in the imposition of a lesser sentence.

ii.

Additionally, the defendant contends that the district court erred because the instructions misinformed the jury that three sentencing options were available, when in fact only two sentencing options existed under the substantive criminal statute – death and life imprisonment. *See* 18 U.S.C. § 1201. When a statute allows the jury to exercise sentencing powers, due process requires that a jury must be informed of all available sentencing options. *See Hicks*

v. Oklahoma, 447 U.S. 343, 346 (1980). At Jones' sentencing hearing the district court informed the jury of the three sentencing options available under § 3593 of the federal death penalty provisions rather than limiting the instructions to the two sentencing options available under § 1201, the substantive criminal statute for which the defendant was convicted. The defendant did not object to the inclusion of the "lesser sentence" option below; therefore, we review for plain error.[10] *See Flores*, 63 F.3d at 1374.

We must first determine whether the district court committed error by instructing the jury of the sentencing options available under § 3593, rather than limiting the instructions to the two sentencing options which existed under the substantive criminal statute. *See Olano*, 507 U.S. at 732-33. If any error occurred regarding the available sentencing options, the error was caused by the disparate sentencing options provided for in the Federal Kidnapping statute, 18 U.S.C. § 1201, and the Federal Death

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[10] At the charge conference, and in written objections, the defendant objected to the court's refusal to include the language "rather than a sentence of life imprisonment without the possibility of release or a lesser sentence" whenever the instructions referred to the jury's responsibility to determine whether the defendant should be sentenced to death. If the district court had actually used the defendant's requested instruction, then we would review under the invited error doctrine. *See United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 606 (5th Cir. 1991). The district court, however, did not use the defendant's requested language. Furthermore, the defendant did not object to other references in the instructions to the "lesser sentence" option. Consequently, we review for plain error.

Penalty Act, 18 U.S.C. § 3593(e)(3). Under § 1201, a defendant convicted of kidnapping with the death of the victim resulting shall be punished by death or life imprisonment. *See* 18 U.S.C. § 1201. Under the federal death penalty provisions, however, the jury may recommend that the court sentence the defendant to death, to life imprisonment without the possibility of release, or some other lesser sentence, upon the unanimous recommendation of the jury. *See* 18 U.S.C. § 3593(e).

The defendant argues that the language of the kidnapping statute clearly limits the possible sentences to death or life imprisonment. Moreover, the defendant argues that the term "life imprisonment" in the kidnapping statute actually means life without the possibility of release because parole no longer exists in the federal system. Thus, the jury actually had only two sentencing options – death or life without the possibility of release. Conversely, the government argues that the jury in fact had three options because Congress distinguishes between "life" and "life without the possibility of release." The government raises § 3594 as an example of the qualitative difference between life and life without the possibility of release. Section 3594 states that if the jury recommends a lesser sentence, then "the court shall impose any lesser sentence that is authorized by law. . . . if the maximum term of imprisonment is life imprisonment, the court may impose a sentence of life imprisonment without the possibility of release." 18 U.S.C. § 3594. Thus, the government argues that the jury in fact had the option of recommending death, life without the possibility of release, or a lesser sentence, but the district court

was obligated to impose life without the possibility of release as the only "lesser sentence" authorized by law.

In deciding whether the FDPA or § 1201 provides the appropriate sentencing options, we must first determine what effect the death penalty scheme has on the substantive criminal law. The FDPA acts like a sentence enhancement provision in that it does not add to or otherwise affect the penalties available under the substantive criminal statutes. *See United States v. Branch*, 91 F.3d 699, 738-40 (5th Cir. 1996) (holding that 18 U.S.C. § 924(c) does not create separate offense). Although the FDPA does not function exactly as a sentence enhancement provision, we will utilize the sentence enhancement analysis in order to determine the effect of the death penalty provisions on the substantive criminal law. In determining whether a statute creates a separate offense or is merely a sentence enhancement provision, the court has suggested the following four factors: (1) whether the statute predicates punishment upon conviction under another section; (2) whether the statute multiplies the penalty received under another section; (3) whether the statute provides guidelines for the sentencing hearing; and (4) whether the statute is titled as a sentencing provision. *Id.* at 738 (citing *United States v. Jackson*, 891 F.2d 1151, 1152 (5th Cir. 1989)). These factors complement traditional tools of statutory interpretation, namely, the text and legislative history. *Id.* at 738. As with the sentence enhancement provisions applicable to the use of a firearm during the commission of a drug crime, the FDPA does not create a separate and independent offense, but depends upon a conviction under another section. *See Branch*, 91 F.3d at

738. Additionally, the death penalty statute merely provides guidelines and procedures for the sentencing hearing. Nothing in the text or legislative history indicates that Congress intended to create new, separate offenses under the death penalty scheme.[11]

Although all three sentencing options were available to the jury under § 3593, the defendant could only receive death or life imprisonment under § 1201, the substantive criminal statute for which Jones was convicted. Contrary to the government's assertion, no meaningful distinction exists between "life" and "life without the possibility of release." Thus, had the jury recommended some lesser sentence, the court would have been obligated to impose life without the possibility of release as the only authorized lesser sentence. Because the substantive criminal statute takes precedence over the death penalty sentencing provisions, the district court should have instructed the jury of the sentencing options available under § 1201. Consequently, the district court committed error by informing the jury of the lesser sentence option available under § 3593.

After determining that error occurred, we must next determine whether the error was clear or obvious error under current law. *See Olano*, 507 U.S. at 734; *Dupre*, 117 F.3d at 817. Prior to this appeal, the death penalty sentencing provisions under which Jones was sentenced had never been reviewed on appeal. No clearly established

[11] The legislative history also supports a holding that § 3593 was intended to create procedures for imposing the death penalty rather than create additional substantive crimes. *See* House Report No. 103-467, 103rd Cong., 2d Sess. (1994).

law answered the question of whether § 3593 or the substantive criminal statute under which the defendant is convicted provides the correct sentencing options. The error was not so obvious, clear, readily apparent, or conspicuous that the judge was derelict by not recognizing the error. Consequently, we hold that instructing the jury as to the sentencing options available under § 3593 was not plain error.

IV. Statutory Aggravating Factors

The defendant argues that the district court committed reversible error by submitting statutory aggravating factors to the jury which failed genuinely to narrow or channel the jury's discretion. The government submitted four statutory aggravating factors to the jury during the penalty phase of the trial. The jury made unanimous findings regarding two statutory aggravating factors.

A.

Jones argues that the inclusion of statutory aggravating factor 2(A), which merely repeated the elements of the crime, did nothing to narrow the jury's discretion, and thus, violated the Eighth Amendment. Statutory aggravating factor 2(A), based on § 3592(c)(1), provides: "The defendant Louis Jones caused the death of Tracie Joy McBride, or injury resulting in the death of Tracie Joy McBride, which occurred during the commission of the offense of Kidnapping."

As stated previously, a capital sentencing scheme must genuinely narrow the class of persons eligible for

the death penalty. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The use of aggravating factors helps to narrow the class of death-eligible persons and thereby channels the jury's discretion. *See Lowenfield v. Phelps*, 484 U.S. 231, 244 (1987). An aggravating factor which merely repeats an element of the crime passes constitutional muster as long as it narrows the jury's discretion. *See id.* at 246. In *Lowenfield*, the Court held that the constitutionally required narrowing function in a capital punishment regime could be performed in either of two ways: "The legislature may itself narrow the definition of capital offenses, . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Lowenfield*, 484 U.S. at 246. Thus, the requisite narrowing can be done at either the guilt or penalty phase of trial.

The FDPA channels the jury's discretion during the penalty phase to ensure that the death penalty is not arbitrarily imposed. The federal death penalty regime establishes the class of persons eligible for the death penalty through its definition of capital offenses, to include only treason, espionage, and certain intentional killings. *See* 18 U.S.C. § 3591. Although the federal death penalty regime defines capital offenses, the narrowing function does not occur until the penalty phase of the trial. In narrowing the jury's discretion in federal homicide prosecutions, the FDPA requires the jury first to find that the defendant had the requisite intent. 18 U.S.C. § 3591. The FDPA further narrows the jury's discretion with the requirement the jury find at least one statutory

aggravating factor prior to recommending the death penalty. *See* 18 U.S.C. § 3592(c). Thus, the FDPA narrows the jury's discretion through the findings of intent and aggravating factors. Repetition of the elements of the crime as an aggravating factor helps to channel the jury's discretion by allowing the jury to consider the circumstances of the crime when deciding the propriety of the death sentence. The jury may constitutionally consider the circumstances of the crime when deciding whether to impose the death penalty. *See Tuilaepa v. California*, 512 U.S. 967, 976 (1994).

The narrowing function was not performed at the guilt phase when the jury convicted Jones of kidnapping with death resulting, but at the penalty phase when the jury found Jones intentionally killed McBride and two statutory aggravating factors existed. Although the jury had already found the defendant guilty of kidnapping with death resulting at the guilt phase of the trial, the jury did not consider whether Jones caused the death of the victim during the commission of the crime of kidnapping until the penalty phase of the trial. The jury could have convicted Jones of kidnapping with death resulting in the guilt phase of the trial and still answered "no" to statutory aggravating factor 2(A) in the penalty phase if the jury found that Jones did not cause the death of the victim during the commission of the crime of kidnapping. The submission of the elements of the crime as an aggravating factor merely allowed the jury to consider the circumstances of the crime when deciding whether to impose the death penalty. Thus, the kidnapping was weighed only once by the jury during the penalty phase of the trial. Consequently, the repetition of the elements

of the crime as an aggravating factor did not contradict the constitutional requirement that aggravating factors genuinely narrow the jury's discretion.

B.

Jones contends that the district court committed reversible error by allowing statutory aggravating factor 2(C). Statutory factor 2(C), based on § 3592(c)(6), provides: "The defendant Louis Jones committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse to Tracie Joy McBride." Jones argues that the language used in aggravating factor 2(C) was unconstitutionally vague, resulting in the arbitrary imposition of the death penalty in violation of the Eighth Amendment. As the Supreme Court stated in *Maynard v. Cartwright*:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*.

Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988) (citation omitted). Due to the difficulty in precisely defining aggravating factors, however, "our vagueness review is quite deferential." *United States v. Flores*, 63 F.3d 1342, 1373 (5th Cir. 1995) (quoting *Tuilaepa v. California*, 512 U.S. 967, 975 (1994)). Consequently, an aggravating factor will be upheld as long as it has some "common-sense core

meaning . . . that criminal juries should be capable of understanding." *Id.*

The language "especially heinous, cruel, and depraved" without a limiting instruction would be unconstitutionally vague. *See Maynard v. Cartwright*, 486 U.S. at 364; *King v. Puckett*, 1 F.3d 280, 284 (5th Cir. 1993). Any vagueness in the language, however, is cured by the limitation in the statute that the offense involve torture or serious physical abuse. *See Walton v. Arizona*, 497 U.S. 639, 654-55 (1990) (citing *Maynard v. Cartwright*, 486 U.S. at 364-65). Moreover, the district court defined each term in aggravating factor 2(C) which resolved any possible vagueness or ambiguity of the language.[12] The statutory

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[12] The district court gave the following limiting instruction to explain statutory aggravating factor 2(C):

> To establish that the defendant killed the victim in an especially heinous, cruel, or depraved manner, the government must prove that the killing involved either torture *or* serious physical abuse to the victim. The terms "heinous, cruel, or depraved" are stated in the disjunctive: any one of them individually may constitute an aggravating circumstance warranting imposition of the death penalty.
>
> "Heinous" means extremely wicked or shockingly evil, where the killing was accompanied by such additional acts of torture or serious physical abuse of the victim as set apart from other killings.
>
> "Cruel" means that the defendant intended to inflict a high degree of pain by torturing the victim in addition to killing the victim.
>
> "Depraved" means that the defendant relished the killing or showed indifference to the suffering of

limitation, along with the district court's instruction, gave the jury an aggravating factor with a "common-sense core meaning" that they were capable of understanding. Thus, the language of statutory aggravating factor 2(C) was not

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the victim, as evidenced by torture or serious physical abuse of the victim.

"Torture" includes mental as well as physical abuse of the victim. In either case, the victim must have been conscious of the abuse at the time it was inflicted; and the defendant must have specifically intended to inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

"Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse – unlike torture – may be inflicted either before or after death and does not require that the victim be conscious of the abuse at the time it was inflicted. However, the defendant must have specifically intended the abuse apart from the killing.

Pertinent factors in determining whether a killing was especially heinous, cruel, or depraved include: infliction of gratuitous violence upon the victim above and beyond that necessary to commit the killing; needless mutilation of the victim's body; senselessness of the killing; and helplessness of the victim.

The word "especially" should be given its ordinary, everyday meaning of being highly or unusually great, distinctive, peculiar, particular, or significant.

unconstitutionally vague and did not lead to the arbitrary imposition of the death penalty in violation of the Eighth Amendment.

V. Non-statutory Aggravating Factors

Jones argues that the death sentence must be reversed because the nonstatutory aggravating factors considered by the jury were unconstitutionally vague, overbroad, and duplicative. After giving the appropriate notice required by § 3593(a), the government submitted the following nonstatutory aggravating factors:

> 3(A). The defendant constitutes a future danger to the lives and safety of other persons as evidenced by specific acts of violence by the defendant Louis Jones.
>
> 3(B). Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas.
>
> 3(C). Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family constitute an aggravating factor of the offense.

The jury unanimously found nonstatutory aggravating factor 3(B) and 3(C) to exist beyond a reasonable doubt.

The government contends that factors 3(B) and 3(C) apply to entirely different areas of aggravation – 3(B) applies to McBride's vulnerability, while 3(C) applies to "victim impact" or the impact of the murder on McBride's family. Although the use of vulnerability and victim impact evidence has been upheld on appeal, the language used in 3(B) and 3(C) does not accomplish this

goal. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (victim impact); *Tuilaepa*, 512 U.S. at 977 (vulnerability through age of victim). The plain meaning of the term "personal characteristics," used in 3(C), necessarily includes "young age, slight stature, background, and unfamiliarity," which the jury was asked to consider in 3(B). Thus, nonstatutory aggravating factors 3(B) and 3(C) are duplicative. As the Tenth Circuit recently stated, "Such double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." *United States v. McCullah*, 76 F.3d 1087, 1111 (10th Cir. 1996). We agree. Such double-counting of aggravating factors creates the risk of an arbitrary death sentence. If the jury has been asked to weigh the same aggravating factor twice, the appellate court cannot assume that "it would have made no difference if the thumb had been removed from death's side of the scale." *Stringer v. Black*, 503 U.S. 222, 232 (1992). Consequently, the district court erred by submitting the duplicative aggravating factors to the jury.

Additionally, the defendant contends that the non-statutory aggravating factors are vague and overbroad, in violation of the Eighth Amendment. *See Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988). We agree. Non-statutory aggravating factors 3(B) and 3(C) fail to guide the jury's discretion, or distinguish this murder from any other murder. We fail to see how the victim's "background," her "personal characteristics," or her "unfamiliarity with San Angelo" made the defendant more deathworthy than other murderers. Furthermore, the district

court offered no additional instructions to clarify the meaning of the non-statutory aggravating factors. The use of the terms "background," "personal characteristics," and "unfamiliarity" without further definition or instruction left the jury with "the kind of open-ended discretion which was held invalid in *Furman v. Georgia*." *See Maynard*, 486 U.S. at 361-62 (1988). Consequently, aggravating factors 3(B) and 3(C) were invalid.

After determining that the non-statutory aggravating factors submitted to the jury were invalid, we must next determine whether the death sentence may stand. The Federal Death Penalty Act sets up a weighing scheme in which the jury is asked to weigh any aggravating factors found to exist beyond a reasonable doubt against any mitigating factors found to exist by a preponderance of the evidence. If the aggravating factors outweigh the mitigating evidence, then the jury may recommend the death penalty. In a weighing scheme, aggravating factors lie at the very heart of the jury's ultimate decision to impose a death sentence.[13] *See Stringer*, 503 U.S. at 230. Under a weighing statute, affirming a death sentence when an aggravating factor has been found invalid requires the appellate court to scrutinize the role which the invalid aggravating factor played in the sentencing

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[13] In non-weighing statutes, the jury must find the existence of one aggravating factor before imposing the death penalty, but such factors play no additional role in the jury's determination of whether a defendant eligible for the death penalty should receive it under the circumstances of the case. *See Stringer v. Black*, 503 U.S. 222, 229-30 (1992) (discussing the Georgia non-weighing death penalty statute at issue in *Zant v. Stephens*, 462 U.S. 862 (1983)).

process in order to comply with the Eighth Amendment requirement of individualized sentencing determinations in death penalty cases. *See Stringer*, 503 U.S. at 230. A rule automatically affirming a death sentence in a weighing scheme as long as one aggravating factor remained would violate the requirement of individualized sentencing. *See Clemons v. Mississippi*, 494 U.S. 738, 752 (1990) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)). When the jury considers an invalid aggravating factor at the sentencing hearing, the appellate court must strike the invalid factor and then either reweigh the remaining aggravating factors against the mitigating evidence or apply harmless error review. *See Clemons v. Mississippi*, 494 U.S. 738, 741 (1990); *Wiley v. Puckett*, 969 F.2d 86, 92 (5th Cir. 1992).

If the appellate court chooses to reweigh the remaining aggravating factors against the mitigating evidence, the court must determine what the jury would have done absent the invalid aggravating factor. *See Stringer*, 503 U.S. at 230. On the other hand, if the appellate court chooses to apply harmless error review, then the harmless error analysis can be applied in the following two ways: First, the appellate court may inquire into whether, beyond a reasonable doubt, the death sentence would have been imposed had the invalid aggravating factor been properly defined in the jury instructions. *See Clemons*, 494 U.S. at 754; *Wiley*, 969 F.2d at 92-93. Second, the appellate court may inquire into whether, beyond a reasonable doubt, the death sentence would have been imposed absent the invalid aggravating factor. *See Clemons*, 494 U.S. at 753; *Wiley*, 969 F.2d at 91. If the

government establishes that an error regarding aggravating factors is harmless beyond a reasonable doubt, then the appellate court may not reverse or vacate the death sentence, unless of course such error rises to the level of a denial of constitutional rights. *See* 18 U.S.C. § 3595.

At this point, the appellate court may either reweigh the aggravating and mitigating evidence or apply one of the methods of harmless error review. *See Wiley*, 969 F.2d at 92. It matters not which standard of review an appellate court chooses to apply because all three standards lead to the same conclusion. If a death sentence would be overturned under harmless error review, then the death sentence would be overturned after reweighing, and vice versa. The government asserts that we must apply the harmless error standard. Although the statute provides that an appellate court "shall not reverse or vacate a sentence of death on account of any error which can be harmless," 18 U.S.C. § 3595(c), the statute does not establish a standard of review. Therefore, an appellate court can choose to apply any of the available forms of review as long as the defendant receives an individual determination of the propriety of his death sentence.

In affirming the defendant's death sentence, we apply the second method of harmless error review. In applying the second method of harmless error review, an appellate court must inquire into whether, beyond a reasonable doubt, the death sentence would have been imposed absent the invalid aggravating factors. *See Clemons*, 494 U.S. at 753; *Wiley*, 969 F.2d at 91. This second form of harmless error review requires the appellate court to redact the invalid aggravating factors and "reconsider the entire mix of aggravating and mitigating

circumstances presented to the jury." *See Wiley*, 969 F.2d at 93.

After removing the offensive non-statutory aggravating factors from the balance, we are left with two statutory aggravating factors and eleven mitigating factors to consider when deciding whether, beyond a reasonable doubt, the death sentence would have been imposed had the invalid aggravating factors never been submitted to the jury. At the sentencing hearing, the government placed great emphasis on the two statutory aggravating factors found unanimously by the jury – Jones caused the death of the victim during the commission of the offense of kidnapping; and the offense was committed in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse of the victim. Under part two of the Special Findings Form, if the jury had failed to find that the government proved at least one of the statutory aggravating factors beyond a reasonable doubt, then the deliberations would have ceased leaving the jury powerless to recommend the death penalty. Therefore, the ability of the jury to recommend the death penalty hinged on a finding of a least one statutory aggravating factor. Conversely, jury findings regarding the nonstatutory aggravating factors were not required before the jury could recommend the death penalty. After removing the two nonstatutory aggravating factors from the mix, we conclude that the two remaining statutory aggravating factors unanimously found by the jury support the sentence of death, even after considering the eleven mitigating factors found by one or more jurors. Consequently, the error was harmless because the death sentence would have been imposed beyond a reasonable

doubt had the invalid aggravating factors never been submitted to the jury.

VI. Conclusion

After considering the eighteen issues raised by the appellant on appeal, we conclude that the sentencing provisions of the Federal Death Penalty Act are constitutional and that the defendant's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Consequently, the conviction and the sentence of death is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 96-10113 & 96-10448

D.C. Docket No. 5:95-CR-47-C-01

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

LOUIS JONES

Defendant – Appellant

Appeals from the United States District Court for the Northern District of Texas, Lubbock.

Before POLITZ, Chief Judge, BENAVIDES and PARKER, Circuit Judges.

JUDGMENT
(Filed Jan. 5, 1998)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the sentence and conviction of the District Court in this cause are affirmed.

ISSUED AS MANDATE: **MAR 12 1998**

OP-OA-J-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10113
96-10448

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

LOUIS JONES

Defendant – Appellant

Appeals from the United States District Court for the Northern District of Texas, Lubbock.

PETITION FOR REHEARING

(Filed Mar. 4, 1998)

Before POLITZ, Chief Judge, BENAVIDES and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above cases is denied.

ENTERED FOR THE COURT:

/s/ Robert M. Parker
United States Circuit Judge

REHG-2

Supreme Court of the United States

No. 97-9361

Louis Jones,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following questions:

1. Whether petitioner was entitled to a jury instruction that the jury's failure to agree on a sentencing recommendation automatically would result in a court-imposed sentence of life imprisonment without possibility of release.

2. Whether there is a reasonable likelihood that the jury instructions led the jury to believe that deadlock on the penalty recommendation would automatically result in a court-imposed sentence less severe that [sic] life imprisonment.

3. Whether the court of appeals correctly held that the submission of invalid non-statutory aggravating factors was harmless beyond a reasonable doubt.

October 5, 1998